Supreme Court, U.S.
FILED
05-1630 JUN 22 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting.

PARTIES TO THE PROCEEDINGS

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondent is Nopring Paulino Penuliar.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 435 F.3d 961. The initial opinion of the court of appeals (App., *infra*, 19a-33a) is reported at 395 F.3d 1037. The decisions of the Board of Immigration Appeals (App., *infra*, 34a) and the immigration judge (App., *infra*, 35a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005, and amended on January 23, 2006. A petition for rehearing was denied on January 23, 2006. On April 12, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 23, 2006. On May 15, 2006, Justice Kennedy further extended the time to June 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense * * *.

Cal. Veh. Code § 10851(a) (West 2000).

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. III 2003), several classes of aliens are subject to removal

from the United States, including those who have been convicted of certain kinds of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category of offenses. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" (and thus an aggravated felony) under the INA, courts apply the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. III 2003).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach

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[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. III 2003). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

and review certain documents in the record of the criminal case (such as the charging instrument and judgment) to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

2. Respondent is a native and citizen of the Philippines. He was admitted to the United States in 1995 as a lawful permanent resident. App., *infra*, 3a, 38a.

In June 2000, respondent was charged in a California court with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). The felony complaint alleged that respondent unlawfully drove and took a 1994 Ford Escort without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to two years of imprisonment. App., *infra*, 3a-4a, 38a-39a, 42a-44a.

In November 2000, respondent was again charged in a California court with unlawful driving or taking of a vehicle. He was also charged with evading an officer, in violation of California Vehicle Code § 2800.2(a) (West 2000). With respect to the former charge, the information alleged that respondent unlawfully drove and took a 1995 Ford van without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the two charges and was sentenced to three years of imprisonment. App., *infra*, 4a, 39a, 48a-52a, 54a-55a.

3. In 2002, the Immigration and Naturalization Service (INS) initiated removal proceedings against respondent.[2] He was charged with removability under Section

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[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. III 2003).

237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of aggravated felonies. The INS alleged that the unlawful-driving-or-taking-of-a-vehicle offenses were aggravated felonies because they were "theft offenses" for which the term of imprisonment was at least one year, 8 U.S.C. 1101(a)(43)(G), and that the offense of evading an officer was an aggravated felony because it was both a "crime of violence," 8 U.S.C. 1101(a)(43)(F), and an "offense relating to obstruction of justice," 8 U.S.C. 1101(a)(43)(S), for which the term of imprisonment was at least one year. App., *infra*, 4a-5a & n.2, 35a-40a.

The immigration judge (IJ) ruled that unlawful driving or taking of a vehicle is a theft offense and that evading an officer is a crime of violence but not a crime relating to obstruction of justice. The IJ accordingly found that respondent was removable from the United States. After ruling that respondent's aggravated-felony convictions rendered him ineligible for cancellation of removal, the IJ ordered him removed to the Phillipines. App., *infra*, 35a-41a.

The Board of Immigration Appeals (BIA) affirmed the IJ's decision without opinion. App., *infra*, 34a.

4. The Ninth Circuit held that none of the crimes of which respondent was convicted was an aggravated felony and granted his petition for review. App., *infra*, 19a-33a.

a. With respect to respondent's conviction for evading an officer, the Ninth Circuit held that the offense was not a crime of violence as a "categorical" matter, because the statute can be violated if the defendant causes property damage or commits at least three motor-vehicle violations of a certain type, and such conduct does not require intent or even recklessness, an

essential element of a "crime of violence." App., *infra*, 23a-26a. The court also held that respondent had not been convicted of a crime of violence under the "modified categorical" approach, because the charging document merely tracked the statutory language and the judgment merely reflected that respondent had pleaded guilty to the charge. *Id.* at 27a-29a.

b. With respect to respondent's convictions for unlawful driving or taking of a vehicle, the Ninth Circuit held that a violation of California Vehicle Code § 10851(a) is not a theft offense as a "categorical" matter. App., *infra*, 29a-31a. The court reasoned that the California statute can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over property, which the court considered an essential element of the generic definition of "theft offense." *Ibid.* The Ninth Circuit also held that the Section 10851(a) convictions were not for a theft offense under the "modified categorical" approach. *Id.* at 31a-33a. Although the charges to which respondent pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a theft offense, because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

5. The government filed a petition for panel rehearing and rehearing en banc, which raised two claims. The first was that the California offense of unlawful driving or taking of a vehicle is an aggravated felony, because aiding and abetting falls within the generic definition of "theft offense." Reh'g Pet. 4-12. The second was that

respondent failed to exhaust administrative remedies, because he did not present to the BIA the claim that the offenses of conviction were not aggravated felonies. *Id.* at 12-13.

The Ninth Circuit denied the petition for rehearing, and issued an amended opinion. App., *infra*, 1a-18a. In the amended opinion, the court stated that the contention that aiding and abetting is part of the generic definition of "theft offense" was foreclosed by a decision issued after the Ninth Circuit's initial decision in this case, *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005), which held that grand theft, in violation of California Penal Code § 487(c) (West 1999), was not a theft offense under the INA because a defendant can be convicted under an aiding-and-abetting theory. App., *infra*, 15a n.6. The amended opinion did not address the government's exhaustion claim.

REASONS FOR GRANTING THE PETITION

1. Since filing its amended opinion, the Ninth Circuit has granted petitions for review in a number of cases on the basis of its decision in this case. One such case is *Duenas-Alvarez* v. *Gonzales*, No. 04-74471, 2006 WL 1009222 (Apr. 18, 2006) (per curiam). As in this case, the offense at issue in *Duenas-Alvarez* was unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). 2006 WL 1009222, at *1. As in this case, the Ninth Circuit held in *Duenas-Alvarez* that that offense is not a "theft offense," because it criminalizes aiding and abetting, which, in the Ninth Circuit's view, is not included in the generic definition of theft offense. *Ibid.*

Simultaneously with the filing of the certiorari petition in this case, the government is filing a certiorari

petition in *Duenas-Alvarez*. As explained below, that case is a more suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. The Court should therefore grant plenary review in *Duenas-Alvarez* and hold the petition in this case pending the disposition of *Duenas-Alvarez*.

2. Under 8 U.S.C. 1252(d)(1), "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The Ninth Circuit treats this requirement as jurisdictional, see *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (2004), as do a number of other courts of appeals, see *Popal* v. *Gonzales*, 416 F.3d 249, 252 (3d Cir. 2005); *Un* v. *Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004); *Foster* v. *INS*, 376 F.3d 75, 77 (2d Cir. 2004) (per curiam); *Wang* v. *Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001); *Fernandez-Bernal* v. *Attorney General of the United States*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam). While the Ninth Circuit denied the government's petition for rehearing in this case without addressing its exhaustion claim, there is a substantial question whether respondent complied with Section 1252(d)(1), and thus whether the court of appeals had jurisdiction.

In his notice of appeal to the BIA, one of the "reason(s) for this appeal" identified by respondent was that "[i]t is not clear that the crimes set out in the Notice to Appear [for removal proceedings] are aggravated felonies." App., *infra*, 63a. And in his brief before the BIA, one of the two issues in the "Statement of Issues" was "[w]hether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and

[was] therefore[] ineligible for relief under § 240A(a) of the Immigration and Nationality Act," which governs cancellation of removal, 8 U.S.C. 1229b(a). App., *infra*, 57a. In the "Argument" section of the brief, however, respondent did not contend that either of the offenses on which his removal was based was not an aggravated felony. Instead, he raised only a constitutional argument concerning the availability of discretionary relief from removal. *Id.* at 59a-60a. And nowhere in either his notice of appeal or his brief did respondent say anything that remotely resembles the aiding-and-abetting theory ultimately adopted by the court of appeals.

In *Duenas-Alvarez*, by contrast, no exhaustion question is present. Before both the IJ and the BIA, Duenas-Alvarez unequivocally took the position that he had not been convicted of a "theft offense" (and thus an aggravated felony), A.R. at 10-16, 186-187, 190-193, *Duenas-Alvarez*, *supra*, and he specifically argued that his crime of conviction was not a theft offense because a defendant can be convicted of violating California Vehicle Code § 10851(a) under an aiding-and-abetting theory, A.R. at 14-15, 191-192, *Duenas-Alvarez*, *supra*. The presence of a threshold issue in this case, but not in *Duenas-Alvarez*, makes *Duenas-Alvarez* a more suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. Accordingly, the Court should grant plenary review in *Duenas-Alvarez* and hold the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Duenas-Alvarez* and then disposed of accordingly.

Respectfully submitted.

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JUNE 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71578

NOPRING PAULINO PENULIAR, PETITIONER

v.

ALBERTO R. GONZALES,* ATTORNEY GENERAL,
RESPONDENT

Argued and Submitted: Dec. 10, 2004
Filed: Jan. 12, 2005
Amended: Jan. 23, 2006

ORDER AMENDING OPINION AND DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Before: BROWNING, PREGERSON, and BERZON, Circuit Judges.

PREGERSON, Circuit Judge.

ORDER

The Opinion filed January 12, 2005, slip op. 453, and appearing at 395 F.3d 1037, is amended as follows:

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* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

1. At slip op. 453, add asterisk footnote in caption following "ALBERTO R. GONZALES." Asterisk footnote shall read, "Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2)."

2. Change the citation at slip op. 465 following the sentence that ends, ". . . a theft offense under the INA." to read, "*See Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005)."

3. Change the citation at slip op. 465 following the sentence that ends, ". . . falls outside the generic definition of theft offense." to read, "*Id.*"

4. Add footnote 6 at slip op. 466 and adjust other footnotes accordingly following the sentence that ends, ". . . qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." The added footnote 6 reads:

> In its petition for rehearing, the government argues that aiding and abetting liability is included in the generic definition of a "theft offense." *See* 8 U.S.C. § 1101(a)(43)(G). That assertion, however, is foreclosed by our decision in *Martinez-Perez*, 417 F.3d at 1028 (holding that a conviction for grand theft under California Penal Code § 487(c) was not a "theft offense" within the meaning of the INA because a defendant could "be convicted of a substantive violation . . . based on an aiding and abetting theory alone"), by which we are bound. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir. 2003) ("A three-judge panel generally has no power to overrule a decision of this court.").

5. Change the citation at slip op. 466 that precedes "B. Modified Categorical Approach" to read, "*See Martinez-Perez*, 417 F.3d at 1027-28."

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**. No further petitions shall be entertained.

OPINION

Nopring Paulino Penuliar petitions for review of a decision of the Board of Immigration Appeals ("BIA"). Penuliar, a lawful permanent resident, pled guilty to two counts of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). Classifying both convictions as "aggravated felonies" under the Immigration and Nationality Act ("INA"), an Immigration Judge ("IJ"), affirmed by the BIA, found Penuliar ineligible for cancellation of removal and voluntary departure, and ordered that Penuliar be deported pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Because we conclude that Penuliar's convictions do not constitute "aggravated felonies" under the INA, we grant his petition for review.

FACTUAL AND PROCEDURAL BACKGROUND

Nopring Paulino Penuliar, a citizen of the Philippines, was admitted to the United States on June 12, 1995, as a lawful permanent resident. On June 30, 2000,

Penuliar pled guilty to one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and was sentenced to two years' imprisonment. On December 13, 2000, Penuliar pled guilty to another count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). He was sentenced to three years' imprisonment for each charge, to be served concurrently.

While serving his sentence in state prison, the Immigration and Naturalization Service ("INS")[1] served Penuliar with a notice to appear.[2] In the notice to appear, the INS alleged that Penuliar was removable for being convicted of "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). The INS also alleged that Penuliar was removable for being convicted of "a theft offense (including receipt of stolen property) or burglary of-

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[1] The INS ceased to exist on March 1, 2003, when its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. However, we refer to the agency as the INS here because the proceedings in this case were instigated before the transfer.

[2] The initial notice to appear charged that Penuliar was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), because he had been convicted of "an offense relating to obstruction of justice," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(S). The IJ ruled that Penuliar's convictions did not constitute offenses "relating to obstruction of justice," and the government did not appeal that decision to the BIA. Accordingly, that decision is not before us.

The remaining charges, which are before us, were included in an amended notice to appear.

fense for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(G).

At Penuliar's removal hearing, the government introduced into evidence a felony complaint charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to that count. The government also introduced a criminal information charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to both counts. Finally, the government introduced a probation report detailing the conduct underlying the charges in the criminal information.

Based on this evidence, the IJ concluded that Penuliar's two convictions for unlawful driving or taking of a vehicle were "theft offense[s]" under 8 U.S.C. § 1101(a)(43)(G), and that Penuliar's conviction for evading an officer was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). Accordingly, the IJ ruled that Penuliar was removable as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and therefore ineligible for cancellation of removal and voluntary departure. *See* 8 U.S.C. §§ 1229b(a)(3), 1229c(a)(1).

On March 31, 2003, the BIA summarily affirmed the decision of the IJ. *See* 8 C.F.R. § 1003.1(e)(4). Penuliar timely filed this petition for review.

JURISDICTION AND STANDARD OF REVIEW

This court lacks jurisdiction to review a final order of removal against an alien who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C). Nonetheless, "[b]ecause the issue in this appeal is whether [the petitioner] committed an aggravated felony, and because we have jurisdiction to determine our own jurisdiction, the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000) (citation omitted).

We review *de novo* whether a particular offense is an aggravated felony. *Id.*

DISCUSSION

To determine whether a conviction is an "aggravated felony" under the INA, we employ the two step test set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). *See Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). First, "we look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)." *Id.* "Under this 'categorical approach,' an offense qualifies as an aggravated felony 'if and only if the full range of conduct covered by the [criminal statute] falls within the meaning of that term.'" *Id.* (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)).

However, when the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, we follow a "modified categorical approach." *See id.; United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). Under this approach, we conduct "a limited examina-

tion of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime." *Chang*, 307 F.3d at 1189. "[W]e do not, however, look to the particular facts underlying the conviction." *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154 (9th Cir. 2003) (quoting *Ye*, 214 F.3d at 1132).

I. Evading an Officer

A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(F), the term "aggravated felony" means "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." Title 18 U.S.C. § 16, in turn, defines the term "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

We have construed 18 U.S.C. § 16 as requiring more than mere negligent conduct. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) ("[W]e hold that the presence of the volitional 'use . . . against' requirement in both prongs of 18 U.S.C. § 16 means that a defendant cannot 815 commit a 'crime of violence' if he negligently—rather than intentionally or recklessly—hits someone or something . . . ."). Thus, in *Trinidad-Aquino* we held that because California's

driving under the influence statute, California Vehicle Code § 23153, can be violated through mere negligence, a violation of the statute was not a "crime of violence" under 18 U.S.C. § 16. *Id.* at 1146.

The Supreme Court recently affirmed this reading of 18 U.S.C. § 16, holding that a conviction under Florida's drunk driving statute was not a "crime a violence." *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 383-84, 160 L.Ed.2d 271 (2004). The Court reasoned that "[t]he key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 382. Similarly, the Court held that we "must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 383. The Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

California Vehicle Code § 2800.2(a) makes it a crime "[i]f a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property." The statute further provides that "willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Cal. Veh. Code § 2800.2(b).

As defined by subsection (b), "willful or wanton disregard" exists if a driver commits three Vehicle Code violations. As one court explained,

> [a]lthough Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof *that the defendant committed three Vehicle Code violations.*

People v. Pinkston, 112 Cal. App. 4th 387, 392, 5 Cal. Rptr. 3d 274 (2003) (emphasis added). Many California Vehicle Code violations, however, do not require reckless or intentional disregard for the safety of persons or property within the meaning of 18 U.S.C. § 16.[3] In other words, "willful or wanton disregard," as defined by California Vehicle Code § 2800.2(b), is broader than the traditional *mens rea* of recklessness. *Cf. Trinidad-Aquino*, 259 F.3d at 1146 ("Thus, recklessness requires conscious disregard of a risk of harm that the defendant is aware of—a volitional requirement absent in negligence."). Because it would be possible to engage in "willful or wanton disregard for the safety of persons or property" by negligently committing three Vehicle

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[3] For instance, a traffic violation point can be assessed where a driver owns and operates a car that is "(1) [n]ot registered or for which any fee has not been paid under [the vehicle] code," "(2) [n]ot equipped as required in [the vehicle] code," or "(3) [n]ot in compliance with the size, weight, or load provisions of [the vehicle] code." Cal. Veh. Code §§ 12810(f), 40001(b)(1)-(3). In addition, a traffic point may be assessed for, "[e]xcept as provided in subdivision (i) [exempting certain conduct where the driver is not the owner of the vehicle], any other traffic conviction involving the safe operation of a motor vehicle upon the highway." *Id.* § 12810(f).

Code violations, Section 2800.2 is broader than a "crime of violence" as defined by 18 U.S.C. § 16.

The government relies on *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), in which we held that the offense of evading an officer under the 1992 version of California Vehicle Code § 2800.2 was a "crime of violence" under 18 U.S.C. § 16. In reaching this conclusion, we relied on California case law construing "willful or wanton misconduct" as "intentional wrongful conduct." *Id.* at 961. But the meaning of "willful or wanton disregard" in section 2800.2 has since been amended to include the commission of three California Vehicle Code violations. *See Pinkston*, 112 Cal. App. 4th at 391, 5 Cal. Rptr. 3d 274 ("Vehicle Code section 2800.2, subdivision (b) . . . was added to section 2800.2 in 1996."). Because *Campos-Fuerte* relied on the previous meaning of "willful or wanton" in reaching its result, it is not binding in the present case.

Accordingly, we conclude that a conviction for evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a "crime of violence" within the meaning of 18 U.S.C. § 16.

B. Modified Categorical Approach

In concluding that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16, and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), the IJ relied on three pieces of evidence. The IJ relied on (1) the November 21, 2000, criminal information charging Penuliar with evading an officer in violation of California Vehicle Code § 2800.2(a), (2) an abstract of judgment showing that Penuliar pled guilty to that charge, and (3) a probation

officer's report.[4] The government did not introduce either Penuliar's plea agreement or a transcript of Penuliar's plea proceeding into the record. Instead, the government argues that the information and abstract of judgment were sufficient for the IJ to determine that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16. We disagree.

The judicially noticeable documents in the record are insufficient to establish whether Penuliar pled guilty to reckless or negligent conduct. The information charging Penuliar with evading an officer contains nothing more than the generic statutory language from California Vehicle Code § 2800.2(a).[5] But as discussed above, the statute is broader than the generic "crime of

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[4] On appeal, however, the government abandons any reliance on the probation officer's report to establish that Penuliar was convicted of a "crime of violence" under the modified approach.

[5] Count three in the November 21, 2000, Information states:

> On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did wilfully and unlawfully, while operating a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all of the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and reasonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.
>
> It is further alleged that the defendant(s) drove with a willful and wa ton disregard for the safety of persons and property.

violence" under 18 U.S.C. § 16 because it criminalizes negligent conduct. Thus, the abstract of judgment, which simply recites that Penuliar pled guilty to the charge, is plainly insufficient to establish that Penuliar pled guilty to reckless conduct constituting a "crime of violence." *See United States v. Contreras-Salas*, 387 F.3d 1095, 1098 (9th Cir. 2004) (holding that defendant was not convicted of a crime of violence where information and judgment of conviction failed to establish whether defendant was convicted of "volitional, reckless, or negligent conduct").

Finally, insofar as the IJ relied on the probation report to establish that Penuliar pled guilty to a "crime of violence," he was in error. *See Corona-Sanchez*, 291 F.3d at 1212 ("[W]e have held that a presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition.").

Accordingly, we conclude that the BIA erred in affirming the IJ's decision that Penuliar's conviction under California Vehicle Code § 2800.2(a) was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F).

II. Unlawful Driving or Taking of a Vehicle

A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(G), the term "aggravated felony" means "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." This circuit defines a "theft offense" under § 1101(a)(43)(G) to mean "a taking of property or an exercise of control over property without consent with the criminal intent

to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (quoting *Corona-Sanchez*, 291 F.3d at 1205).

In *Corona-Sanchez*, we held that a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical "theft offense" under 8 U.S.C. § 1101(a)(43)(G). 291 F.3d at 1208. In reaching this conclusion, we relied in part on the broad nature of aiding and abetting liability under California law, noting that such liability "extend[s] even to promotion and instigation." *Id.*; *see also People v. Beeman*, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, *or of encouraging or facilitating* commission of, the offense." (emphasis added)). We reasoned that because a defendant can be convicted of the substantive offense for aiding and abetting a theft, "it would not be apparent from reference to the statute of conviction alone to discern whether or not the criminal act was embraced within the federal sentencing definition." *Corona-Sanchez*, 291 F.3d at 1208.

We recently applied this same reasoning, holding that a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense under the INA. *See Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005). Relying on our decision in *Corona-Sanchez*, we concluded that "[b]ecause a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting

theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.*

A conviction under California's vehicle theft statute is broader than the generic definition of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) for the same reason. Under California Vehicle Code § 10851(a), a person is guilty of unlawful driving or taking of a vehicle if he or she

> drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or . . . is a party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing. . . .

Cal. Veh. Code § 10851(a) (emphasis added). As the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability. *See, e.g., People v. Clark*, 251 Cal. App. 2d 868, 874, 60 Cal. Rptr. 58 (1967) ("At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving."). Because the statute criminalizes activity that is neither "a taking of property or an exercise of control over property," we conclude that a conviction under California Vehicle Code § 10851(a) does not categorically qualify as a "theft offense" within the

meaning of 8 U.S.C. § 1101(a)(43)(G).[6] See *Martinez-Perez*, 417 F.3d at 1027-28.

B. Modified Categorical Approach

In concluding that Penuliar committed a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), the IJ relied on two separate convictions under California Vehicle Code § 10851(a). The IJ relied on a felony complaint, dated June 1, 2000, charging Penuliar with unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on June 30, 2000. The IJ also relied on a criminal information, dated November 21, 2000, charging Penuliar with another count of unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on December 13, 2000.[7] As was the case with Penuliar's conviction for

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[6] In its petition for rehearing, the government argues that aiding and abetting liability is included in the generic definition of a "theft offense." *See* 8 U.S.C. § 1101(a)(43)(G). That assertion, however, is foreclosed by our decision in *Martinez-Perez*, 417 F.3d at 1028 (holding that a conviction for grand theft under California Penal Code § 487(c) was not a "theft offense" within the meaning of the INA because a defendant could "be convicted of a substantive violation . . . based on an aiding and abetting theory alone"), by which we are bound. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir. 2003) ("A three-judge panel generally has no power to overrule a decision of this court.").

[7] The IJ also relied on a probation officer's report that details the facts underlying Penuliar's December 13, 2000, conviction for unlawful driving or taking of a vehicle. However, as previously discussed, the IJ's reliance was misplaced insofar as he used the probation officer's report to establish that Penuliar pled guilty to conduct described therein. *See Corona- Sanchez*, 291 F.3d at 1212.

evading an officer, the government did not submit Penuliar's actual plea agreement or a transcript of the plea proceeding.

The government argues that because both counts of unlawful driving and taking of a vehicle describe Penuliar as a principal, and because Penuliar pled guilty to both counts, the charging documents and the abstract of judgment are sufficient to establish that Penuliar was convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Indeed, both charging documents recited the statutory language for unlawful driving or taking of a vehicle under California law, charging Penuliar with "unlawfully driv[ing] and tak[ing] a certain vehicle . . . then and there the personal property of [another] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."[8]

However, as we recognized in *Corona-Sanchez*, under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as

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[8] Count One in the June 1, 2000, felony complaint states:

> On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Count Three of the November 21, 2000 criminal information is identical in its language, except that it lists a different car, license number, and owner.

an accusatory pleading against a principal. 291 F.3d at 1207-08; *see* Cal. Penal Code §§ 971, 31; *see also People v. Greenberg*, 111 Cal. App. 3d 181, 188, 168 Cal. Rptr. 416 (1980) ("In California one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and abetting theory so long as defendant is charged in that pleading as a principal to the substantive offense and thus receives notice of the charge against him."). Thus, even if Penuliar pled guilty to the charges of unlawful driving or taking of a vehicle in the information and felony complaint, this alone is insufficient to unequivocally demonstrate that he actually pled guilty to activity of a principal, e.g., taking and exercising control over a stolen car.

Again, we must conclude that the IJ erred in finding that Penuliar had been convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). The charging documents, coupled with the abstracts of judgment, simply do not prove that Penuliar actually took and exercised control over a stolen car. On the basis of the record, it is equally plausible that Penuliar pled guilty to the charges based on his activity as an accomplice.

CONCLUSION

In sum, we hold that evading an officer in violation of California Vehicle Code § 2800.2(a), is not categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). We also hold that unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Finally, we conclude that the BIA

erred in affirming the IJ's decision that Penuliar pled guilty to a "crime of violence" or a "theft offense" under the INA.

PETITION GRANTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71578

NOPRING PAULINO PENULIAR, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL, RESPONDENT

Argued and Submitted: Dec. 10, 2004
Filed: Jan. 12, 2005

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before: BROWNING, PREGERSON, and BERZON, Circuit Judges.

PREGERSON, Circuit Judge.

Nopring Paulino Penuliar petitions for review of a decision of the Board of Immigration Appeals ("BIA"). Penuliar, a lawful permanent resident, pled guilty to two counts of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). Classifying both convictions as "aggravated felonies" under the Immigration and Nationality Act ("INA"), an Immigration Judge ("IJ"), affirmed by the BIA, found Penuliar ineligible for cancellation of removal and voluntary departure, and

ordered that Penuliar be deported pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). Because we conclude that Penuliar's convictions do not constitute "aggravated felonies" under the INA, we grant his petition for review.

FACTUAL AND PROCEDURAL BACKGROUND

Nopring Paulino Penuliar, a citizen of the Philippines, was admitted to the United States on June 12, 1995, as a lawful permanent resident. On June 30, 2000, Penuliar pled guilty to one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and was sentenced to two years' imprisonment. On December 13, 2000, Penuliar pled guilty to another count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a). He was sentenced to three years' imprisonment for each charge, to be served concurrently.

While serving his sentence in state prison, the Immigration and Naturalization Service ("INS")[1] served Penuliar with a notice to appear.[2] In the notice

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[1] The INS ceased to exist on March 1, 2003, when its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135. However, we refer to the agency as the INS here because the proceedings in this case were instigated before the transfer.

[2] The initial notice to appear charged that Penuliar was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), because he had been convicted of "an offense relating to obstruction of justice," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(S). The IJ ruled that Penuliar's convictions did not constitute offenses "relating to obstruction of justice," and the government did not appeal that decision to the BIA. Accordingly, that decision is not before us.

to appear, the INS alleged that Penuliar was removable for being convicted of "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F). The INS also alleged that Penuliar was removable for being convicted of "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year," an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(G).

At Penuliar's removal hearing, the government introduced into evidence a felony complaint charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to that count. The government also introduced a criminal information charging Penuliar with, *inter alia*, one count of unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a), and one count of evading an officer in violation of California Vehicle Code § 2800.2(a), and a corresponding abstract of judgment showing that Penuliar pled guilty to both counts. Finally, the government introduced a probation report detailing the conduct underlying the charges in the criminal information.

Based on this evidence, the IJ concluded that Penuliar's two convictions for unlawful driving or taking of a vehicle were "theft offense[s]" under 8 U.S.C. § 1101(a)(43)(G), and that Penuliar's conviction for

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The remaining charges, which are before us, were included in an amended notice to appear.

evading an officer was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). Accordingly, the IJ ruled that Penuliar was removable as an "aggravated felon" under 8 U.S.C. § 1227(a)(2)(A)(iii), and therefore ineligible for cancellation of removal and voluntary departure. *See* 8 U.S.C. §§ 1229b(a)(3), 1229c(a)(1).

On March 31, 2003, the BIA summarily affirmed the decision of the IJ. *See* 8 C.F.R. § 1003.1(e)(4). Penuliar timely filed this petition for review.

JURISDICTION AND STANDARD OF REVIEW

This court lacks jurisdiction to review a final order of removal against an alien who has committed an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C). Nonetheless, "[b]ecause the issue in this appeal is whether [the petitioner] committed an aggravated felony, and because we have jurisdiction to determine our own jurisdiction, the jurisdictional question and the merits collapse into one." *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000) (citation omitted).

We review *de novo* whether a particular offense is an aggravated felony. *Id.*

DISCUSSION

To determine whether a conviction is an "aggravated felony" under the INA, we employ the two step test set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). *See Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). First, "we look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43)." *Id.* "Under this 'categorical approach,' an offense qualifies as an aggravated felony 'if and only if the full range of

conduct covered by the[criminal statute] falls within the meaning of that term.'" *Id.* (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)).

However, when the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, we follow a "modified categorical approach." *See id.; United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). Under this approach, we conduct "a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime." *Chang*, 307 F.3d at 1189. "[W]e do not, however, look to the particular facts underlying the conviction." *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154 (9th Cir. 2003) (quoting *Ye*, 214 F.3d at 1132).

I. Evading an Officer

A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(F), the term "aggravated felony" means "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." Title 18 U.S.C. § 16, in turn, defines the term "crime of violence" to mean:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

We have construed 18 U.S.C. § 16 as requiring more than mere negligent conduct. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) ("[W]e hold that the presence of the volitional 'use . . . against' requirement in both prongs of 18 U.S.C. § 16 means that a defendant cannot commit a 'crime of violence' if he negligently—rather than intentionally or recklessly—hits someone or something . . . ."). Thus, in *Trinidad-Aquino* we held that because California's driving under the influence statute, California Vehicle Code § 23153, can be violated through mere negligence, a violation of the statute was not a "crime of violence" under 18 U.S.C. § 16. *Id.* at 1146.

The Supreme Court recently affirmed this reading of 18 U.S.C. § 16, holding that a conviction under Florida's drunk driving statute was not a "crime a violence." *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 383-84, 160 L.Ed.2d 271 (2004). The Court reasoned that "[t]he key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 382. Similarly, the Court held that we "must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 383. The Court concluded that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.*

California Vehicle Code § 2800.2(a) makes it a crime "[i]f a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pur-

sued vehicle is driven in a willful or wanton disregard for the safety of persons or property." The statute further provides that "willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." Cal. Veh.Code § 2800.2(b).

As defined by subsection (b), "willful or wanton disregard" exists if a driver commits three Vehicle Code violations. As one court explained,

> [a]lthough Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof *that the defendant committed three Vehicle Code violations.*

People v. Pinkston, 112 Cal. App. 4th 387, 392, 5 Cal. Rptr.3d 274 (2003) (emphasis added). Many California Vehicle Code violations, however, do not require reckless or intentional disregard for the safety of persons or property within the meaning of 18 U.S.C. § 16.[3] In

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[3] For instance, a traffic violation point can be assessed where a driver owns and operates a car that is "(1) [n]ot registered or for which any fee has not been paid under [the vehicle] code," "(2) [n]ot equipped as required in [the vehicle] code," or "(3)[n]ot in compliance with the size, weight, or load provisions of [the vehicle] code." Cal. Veh.Code §§ 12810(f), 40001(b)(1)-(3). In addition, a traffic point may be assessed for, "[e]xcept as provided in subdivision (i) [exempting certain conduct where the driver is not the owner of the vehicle], any other traffic conviction involving the safe operation of a motor vehicle upon the highway." *Id.* § 12810(f).

other words, "willful or wanton disregard," as defined by California Vehicle Code § 2800.2(b), is broader than the traditional *mens rea* of recklessness. *Cf. Trinidad-Aquino*, 259 F.3d at 1146 ("Thus, recklessness requires conscious disregard of a risk of harm that the defendant is aware of—a volitional requirement absent in negligence."). Because it would be possible to engage in "willful or wanton disregard for the safety of persons or property" by negligently committing three Vehicle Code violations, Section 2800.2 is broader than a "crime of violence" as defined by 18 U.S.C. § 16.

The government relies on *United States v. Campos-Fuerte*, 357 F.3d 956 (9th Cir. 2004), in which we held that the offense of evading an officer under the 1992 version of California Vehicle Code § 2800.2 was a "crime of violence" under 18 U.S.C. § 16. In reaching this conclusion, we relied on California case law construing "willful or wanton misconduct" as "intentional wrongful conduct." *Id.* at 961. But the meaning of "willful or wanton disregard" in section 2800.2 has since been amended to include the commission of three California Vehicle Code violations. *See Pinkston*, 112 Cal.App.4th at 391, 5 Cal. Rptr. 3d 274 ("Vehicle Code section 2800.2, subdivision (b) . . . was added to section 2800.2 in 1996."). Because *Campos-Fuerte* relied on the previous meaning of "willful or wanton" in reaching its result, it is not binding in the present case.

Accordingly, we conclude that a conviction for evading an officer in violation of California Vehicle Code § 2800.2 does not categorically qualify as a "crime of violence" within the meaning of 18 U.S.C. § 16.

B. Modified Categorical Approach

In concluding that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16, and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), the IJ relied on three pieces of evidence.

The IJ relied on (1) the November 21, 2000, criminal information charging Penuliar with evading an officer in violation of California Vehicle Code § 2800.2(a), (2) an abstract of judgment showing that Penuliar pled guilty to that charge, and (3) a probation officer's report.[4] The government did not introduce either Penuliar's plea agreement or a transcript of Penuliar's plea proceeding into the record. Instead, the government argues that the information and abstract of judgment were sufficient for the IJ to determine that Penuliar's conviction for evading an officer was a "crime of violence" under 18 U.S.C. § 16. We disagree.

The judicially noticeable documents in the record are insufficient to establish whether Penuliar pled guilty to reckless or negligent conduct. The information charging Penuliar with evading an officer contains nothing more than the generic statutory language from California Vehicle Code § 2800.2(a).[5] But as discussed

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[4] On appeal, however, the government abandons any reliance on the probation officer's report to establish that Penuliar was convicted of a "crime of violence" under the modified approach.

[5] Count three in the November 21, 2000, Information states:

> On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did wilfully and unlawfully, while operating

above, the statute is broader than the generic "crime of violence" under 18 U.S.C. § 16 because it criminalizes negligent conduct. Thus, the abstract of judgment, which simply recites that Penuliar pled guilty to the charge, is plainly insufficient to establish that Penuliar pled guilty to reckless conduct constituting a "crime of violence." *See United States v. Contreras-Salas*, 387 F.3d 1095, 1098 (9th Cir. 2004) (holding that defendant was not convicted of a crime of violence where information and judgment of conviction failed to establish whether defendant was convicted of "volitional, reckless, or negligent conduct").

Finally, insofar as the IJ relied on the probation report to establish that Penuliar pled guilty to a "crime of violence," he was in error. *See Corona-Sanchez*, 291 F.3d at 1212 ("[W]e have held that a presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition.").

Accordingly, we conclude that the BIA erred in affirming the IJ's decision that Penuliar's conviction

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a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all of the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and reasonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.

It is further alleged that the defendant(s) drove with a willful and wanton disregard for the safety of persons and property.

under California Vehicle Code § 2800.2(a) was a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F).

II. Unlawful Driving or Taking of a Vehicle

A. Categorical Approach

Under 8 U.S.C. § 1101(a)(43)(G), the term "aggravated felony" means "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." This circuit defines a "theft offense" under § 1101(a)(43)(G) to mean "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (quoting *Corona-Sanchez*, 291 F.3d at 1205).

In *Corona-Sanchez*, we held that a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical "theft offense" under 8 U.S.C. § 1101(a)(43)(G). 291 F.3d at 1208. In reaching this conclusion, we relied in part on the broad nature of aiding and abetting liability under California law, noting that such liability "extend[s] even to promotion and instigation." *Id.*; *see also People v. Beeman*, 35 Cal. 3d 547, 560, 199 Cal. Rptr. 60, 674 P.2d 1318 (1984) ("[T]he weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, *or of encouraging or facilitating* commission of, the offense." (emphasis added)). We reasoned that because a defendant can be convicted of the substantive offense for aiding and abetting a theft, "it would not be apparent from reference to the

statute of conviction alone to discern whether or not the criminal act was embraced within the federal sentencing definition." *Corona-Sanchez*, 291 F.3d at 1208.

We recently applied this same reasoning, holding that a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense under the INA. *Martinez-Perez v. Ashcroft*, 393 F.3d 1018 (9th Cir. 2004). Relying on our decision in *Corona-Sanchez*, we concluded that "[b]ecause a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.* at 1022.

A conviction under California's vehicle theft statute is broader than the generic definition of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G) for the same reason. Under California Vehicle Code § 10851(a), a person is guilty of unlawful driving or taking of a vehicle if he or she

> drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, *or . . . is a party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing. . . .

Cal. Veh.Code § 10851(a) (emphasis added). As the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability. *See, e.g.*, *People v. Clark*, 251 Cal.App.2d 868, 874, 60 Cal. Rptr. 58 (1967) ("At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must

have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving."). Because the statute criminalizes activity that is neither "a taking of property or an exercise of control over property," we conclude that a conviction under California Vehicle Code § 10851(a) does not categorically qualify as a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G). *See Martinez-Perez*, 393 F.3d at 1022.

B. Modified Categorical Approach

In concluding that Penuliar committed a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G), the IJ relied on two separate convictions under California Vehicle Code § 10851(a). The IJ relied on a felony complaint, dated June 1, 2000, charging Penuliar with unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on June 30, 2000. The IJ also relied on a criminal information, dated November 21, 2000, charging Penuliar with another count of unlawful driving or taking of a vehicle in violation of California Penal Code § 10851(a), and an abstract of judgment showing that Penuliar pled guilty to that charge on December 13, 2000.[6] As was the case with Penuliar's conviction for evading an officer, the government did not submit

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[6] The IJ also relied on a probation officer's report that details the facts underlying Penuliar's December 13, 2000, conviction for unlawful driving or taking of a vehicle. However, as previously discussed, the IJ's reliance was misplaced insofar as he used the probation officer's report to establish that Penuliar pled guilty to conduct described therein. *See Corona-Sanchez*, 291 F.3d at 1212.

Penuliar's actual plea agreement or a transcript of the plea proceeding.

The government argues that because both counts of unlawful driving and taking of a vehicle describe Penuliar as a principal, and because Penuliar pled guilty to both counts, the charging documents and the abstract of judgment are sufficient to establish that Penuliar was convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Indeed, both charging documents recited the statutory language for unlawful driving or taking of a vehicle under California law, charging Penuliar with "unlawfully driv[ing] and tak[ing] a certain vehicle . . . then and there the personal property of [another] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."[7]

However, as we recognized in *Corona-Sanchez*, under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal. 291 F.3d at

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[7] Count One in the June 1, 2000, felony complaint states:

> On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Count Three of the November 21, 2000, criminal information is identical in its language, except that it lists a different car, license number, and owner.

1207-08; see Cal. Penal Code § § 971, 31; *see also People v. Greenberg*, 111 Cal.App.3d 181, 188, 168 Cal. Rptr. 416 (1980) ("In California one may be convicted of aiding and abetting without the accusatory pleading reciting the aiding and abetting theory so long as defendant is charged in that pleading as a principal to the substantive offense and thus receives notice of the charge against him."). Thus, even if Penuliar pled guilty to the charges of unlawful driving or taking of a vehicle in the information and felony complaint, this alone is insufficient to unequivocally demonstrate that he actually pled guilty to activity of a principal, e.g., taking and exercising control over a stolen car.

Again, we must conclude that the IJ erred in finding that Penuliar had been convicted of a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). The charging documents, coupled with the abstracts of judgment, simply do not prove that Penuliar actually took and exercised control over a stolen car. On the basis of the record, it is equally plausible that Penuliar pled guilty to the charges based on his activity as an accomplice.

CONCLUSION

In sum, we hold that evading an officer in violation of California Vehicle Code § 2800.2(a), is not categorically a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F). We also hold that unlawful driving or taking of a vehicle in violation of California Vehicle Code § 10851(a) is not categorically a "theft offense" under 8 U.S.C. § 1101(a)(43)(G). Finally, we conclude that the BIA erred in affirming the IJ's decision that Penuliar pled guilty to a "crime of violence" or a "theft offense" under the INA.

PETITION GRANTED.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A44-948-659 – IMPERIAL Date: [MAR 31 2003]

In re: *S-PENULIAR, NOPRING PAULINO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: RUDY CARDENAS, JR./HAROLD FIFIELD

ON BEHALF OF SERVICE: ANTHONY M. CACAVIO

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
El Centro, California

File No.: A 44 948 659

IN THE MATTER OF
NOPRING PAULINO PENULIAR, RESPONDENT

October 30, 2002

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:

Rudy Cardinez, Esquire
1030 Broadway, Suite 108
El Centro, California 92243

ON BEHALF OF SERVICE:

Thomas Haine, Esquire
Assistant District Counsel
El Centro, California

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at anytime after admission you have been convicted of an aggravated felony as defined in

Section 101(a)(43)(S) of the Act, an offense relating to the obstruction of justice, perjury or subordination of perjury or bribery of a witness for which the term of imprisonment ordered is at least one year.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at anytime after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, by the Immigration Act of 1990 in that you were convicted of an aggravated felony as defined in Section 101(a)(43) (F) and (G) of the Illegal Immigration and Immigrant Responsibility Act of 1996 anytime after entry.

APPLICATION: Cancellation of removal on Form 42A under Section 240A(a) of the Immigration and Nationality Act, as amended.

ORAL DECISION OF THE IMMIGRATION JUDGE

The Immigration Service issued a Notice to Appear on April 23rd, 2002 setting forth the first ground of deportability listed above as the basis for the respondent's removal from the United States. The Notice to

Appear was served on the respondent by personal service on April 25th, 2002 and filed with the Immigration Court on May 13th, 2002.

The Notice to Appear directed the respondent to appear before an Immigration Judge on May 16th, 2002.

The respondent did appear before the Immigration Court on May 16th, 2002 at Calapetria (phonetic sp.) State Prison, Calapetria, California. That is a State Prison that is a branch of the California Department of Corrections. The Court holds institutional hearings in that facility.

The respondent indicated that he wished to proceed in English. The respondent was placed under oath to tell the truth in the proceeding. The respondent confirmed that he had received a copy of the Notice to Appear and that his true name is as set forth on the Notice to Appear.

He was advised of the purpose of the proceeding and why he was in court. He stated that he understood that. He was advised of the rights to which he is entitled in these proceedings. He stated that he understood that. The respondent was advised of each of the allegations filed against him by the Immigration Service and the aggravated felony ground of deportability and he stated that he understood those.

The respondent confirmed that he had received Form 41 setting forth his appeal rights and that he had received the list of free legal services.

The respondent was asked if he had retained counsel. He stated that his family has hired Attorney Harold Finefield. He requested the matter be postponed to give him an opportunity to have his attorney appear. The matter was so continued.

At a subsequent hearing on July 10th of 2002 the respondent admitted that he is not a citizen or a national of the United States. That he is a native and citizen of the Philippines. That he had been admitted to the United States at Los Angeles, California on or about June 12, 1995 as an immigrant. He entered a denial to allegations seven, eight, nine, ten and eleven as well as twelve, those being three criminal convictions out of the Los Angeles County Superior Court lodged against him by the Immigration and Naturalization Service.

Based upon the respondent's denials, a denial was entered on his behalf to the obstruction of justice, aggravated felony.

The matter was set for a subsequent hearing.

The respondent filed with the Court an application to be considered for cancellation of removal. It is marked as four. The Immigration and Naturalization Service offered into evidence conviction records that were marked and admitted without objection as Exhibit No. 2 and Exhibit No. 3.

The respondent offered a letter from his mother and the mother of his child and those two letters were marked collectively as Exhibit No. 5 and admitted into evidence.

The parties rested on the allegations of removal.

The Court has read and considered the conviction records marked and admitted as Exhibit No. 2 and 3.

The Court is satisfied that the respondent was convicted on June 30th, 2000 in Los Angeles County, California Superior Court for the offense of unlawfully taking a vehicle in violation of Section 10851(a) of the

California Vehicle Code for which he was sentenced to confinement for two years. That particular conviction and the sentence imposed is proved by Exhibit No. 3.

The Court finds that the December 13th 2000 convictions in the Los Angeles County Superior Court, one for the unlawful taking of a vehicle in violation of Section 10851 of the California Vehicle Code for which the respondent was sentenced to a term of confinement of three years and the offense of evading an officer in violation of Section 2800.2(a) of the California Vehicle Code for which he was sentenced to confinement for a period of three years has been proven by Exhibit No. 2.

Based upon the admissions of the respondent and Exhibits No. 2 and 3, the Court will find that the Notice to Appear ground of deportability, that being that after his admission that he has been convicted of an obstruction of justice offense, perjury or subordination of perjury, bribery of a witness, aggravated felony has not been sustained. The Court is not satisfied that evading an officer falls into that category so the Court will find that that ground of deportabiity has not been sustained.

Turning to the lodged charge in Exhibit No. 1-A, the Court finds that after his admission he has been convicted of an aggravated felony under subsection (g) of the Immigration Act, 101(a)(43), a theft offense for which the term of imprisonment is at least one year. That established by the 10851 conviction of June 30th, 2000 for which a two year sentence was imposed and also by the December 13th, 2000 conviction for the same offense for which a term of imprisonment of three years was imposed.

Turning to the lodged charge in Exhibit No. 1-B, the Court is likewise satisfied and makes a finding that the

aggravated felony after admission conviction for evading an officer for which a one year term was imposed is an aggravated felony under Section 101(a)(43)(F), a crime of violence for which the term of imprisonment imposed was at least one year.

Counsel for respondent was queried as to whether there was any viable claim for protection under withholding or Article III of the Convention Against Torture. Counsel related a conversation he had with his client.

Based upon that, the Court queried the respondent as to whether he had any reason to believe that it was more likely than not that his life or freedom would be in danger if he is returned to his native country on account of his race, religion, nationality, membership in a particular social group or his political opinion and he responded "no". The respondent was then asked if he had any reason to believe that it was more likely than not that he would be tortured if returned to his native country by a public official, someone acting on behalf of the government or with the government's acquiescence in his known torture and he responded "no".

The Court would find that the respondent based upon the convictions that he's suffered that are aggravated felonies, that he is statutorily ineligible to be considered for cancellation of removal in either of its forms.

The respondent is statutorily ineligible to be considered for voluntary departure in either of its forms. He is statutorily ineligible to be considered for asylum. He is statutorily ineligible to be considered for registry and there is no issue that 212(c) applies in this case.

Based upon the Court's questioning of the respondent, there is no viable claim to be considered for with-

holding or Article III protection under the Convention Against Torture.

No applications were submitted for other forms of relief and the respondent is not eligible for cancellation. The Court denies his application for cancellation of removal under Section 240A(a) of the Immigration Act, as amended.

Based upon the evidence of record, the Court orders the respondent removed from the United States to the Philippines as charged by the Immigration Service under the following theories: Section 237(a)(2))A)(iii), that he has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) and (G).

No applications for relief having been sustained, the respondent is ordered removed from the United States to the Philippines as charged.

/s/ DENNIS R. JAMES
DENNIS R. JAMES
Immigration Judge

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]

[ ] SUPERIOR COURT OF CALIFORNIA, COUNTY OF: LOS ANGELES
[ ] MUNICIPAL BRANCH OR JUDICIAL DISTRICT: SOUTHEAST

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: PENULIAR, NOPRING PAULINO DOB: 11-11-79 AKA: CII #: BOOKING #: 6639791 [ ] NOT PRESENT	CASE NUMBER NA 045170
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT [ ] AMENDED ABSTRACT	
DATE OF HEARING: 12-13-00 / DEPT NO.: SE S / JUDGE: L.S. KNUPP	
CLERK: E. CASSIDY / REPORTER: L. PERALTA / PROBATION NO. OR PROBATION OFFICER: X 1762327	
COUNSEL FOR PEOPLE: M. GROSBARD / COUNSEL FOR DEFENDANT: D. BUTKO [ ] APPTD	

1. Defendant was convicted of the commission of the following felony:

CNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	COURT	PLEA	TERM (L, M, U.)	TIME IMPOSED: YRS.	MOS.
1	VC	10851(A)	UNLAWFUL TAKE VEH	00	06 30 00			X	M	2	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes).
5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $___ per PC 1202.4(b) forthwith per PC 2085.5.
   b. RESTITUTION FINE of: $ ___ per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $____ per PC 1202.4(f) to [ ] victim(s)* [ ] Restitution Fund
   (*List victim name(s) if known and amount breakdown in item 7, below.)
   (1) [ ] Amount to be determined. (2) [ ] Interest rate of: _% (not to exceed 10% per PC 1202.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts: _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.7(a). f. [ ] FINE of $ _____ per PC 1202.5
6. TESTING: [ ] AIDS [ ] DNA pursuant to [ ] PC 1202.1 [ ] PC 290.2 [ ] other (specify)
7. Other orders (specify): Ct 3 (Misd) = Defendant sentenced to 60 das C.J. to run concurrently with sentence Ct 1. (May be served in any state institution.)
8.

TOTAL TIME IMPOSED:	2	0

9. [ ] This sentence is to run concurrent with (*specify*):
10. Execution of sentence imposed
    a. [ ] at initial sentencing hearing.
    b. [ ] at resentencing per decision on appeal
    c. [xx] after revocation of probation.
    d. [ ] at resentencing per recall of commitment (PC 1170(d).)
    e. [ ] other (*specify*):
11.

DATE SENTENCE PRONOUNCED	CREDIT FOR TIME SPENT IN CUSTODY 176	TOTAL DAYS. INCLUDING:	ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS 28	[ ] 4019 [ ] 2933.1	SERVED TIME IN STATE INSTITUTION [ ] DMH	[ ] CDD	[ ] CRC
12-13-00								

12. The defendant is remanded to the custody of the sheriff [xx] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.
    To be delivered to [xx] the reception center designed by the director of the California Department of Corrections.
    [ ] other (specify):

CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
/s/ Illegible	JAN 19 2001

This form is prescribed under PC1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

possess an instrument and weapon of the kind commonly known as a BILLY CLUB.

* * * * *

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER NA045170, CONSISTS OF 6 COUNT(S).

Executed at LONG BEACH, County of Los Angeles, on June 1, 2000.

/s/ S. NELSON
DECLARANT AND COMPLAINANT

GIL GARCETTI, DISTRICT ATTORNEY

/S/ BY: MARC MERRICK
MARC MERRICK, DEPUTY

AGENCY: LONG BEACH PD I/O: S. NELSON

ID NO.: 5195 PHONE: 310-570-7444

DR NO.: 000040799 OPERATOR: WY

PRELIM. TIME EST.: 1 HOUR(S)

OF FINANCIAL RESPONSIBILITY—PRIOR CONVICTION, in violation of VEHICLE CODE SECTION 16028(a), an Infraction, was committed by NOPRING PAULINO PENULIAR, who did, without evidence of financial responsibility, drive upon a highway a motor vehicle required to be registered in this state.

It is further alleged that the defendant was previously convicted of this offense within the past three years.

* * * * *

COUNT 5

On or about May 31, 2000, in the County of Los Angeles, the crime of POSSESSION OF BURGLAR'S TOOLS, in violation of PENAL CODE SECTION 466, a Misdemeanor, was committed by STEVE SIMPILO, who did unlawfully have in his/her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water pump pliers, slidehammer, slim jim, tension bar, lockpick gun, tubular lock pick, floor safe door puller, master key, and other instrument and tool with intent feloniously to break and enter a building, railroad car, aircraft, vessel, trailer coach, and vehicle.

* * * * *

COUNT 6

On or about May 31, 2000, in the County of Los Angeles, the crime of POSSESSION OF A DEADLY WEAPON, in violation of PENAL CODE SECTION 12020(a)(1), a Misdemeanor, was committed by STEVE SIMPILO, who did unlawfully manufacture, cause to be manufactured, import into the State of California, keep for sale, offer and expose for sale, and give, lend, and

* * * * *

COUNT 2

On or about May 31, 2000, in the County of Los Angeles, the crime of RECEIVING STOLEN PROPERTY, MOTOR VEHICLE, in violation of PENAL CODE SECTION 496d(a), a Felony, was committed by STEVE SIMPILO and NOPRING PAULINO PENULIAR, who did unlawfully buy and receive 1994 FORD ESCORT, LICENSE #3GUM326 that was stolen and had been obtained in a manner constituting theft and extortion, knowing the property to be stolen and obtained, and did conceal, sell, withhold, and aid in concealing, selling and withholding said property.

* * * * *

COUNT 3

On or about May 31, 2000, in the County of Los Angeles, the crime of DRIVING WHEN PRIVILEGE SUSPENDED OR REVOKED, in violation of VEHICLE CODE SECTION 14601.1(a), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive a motor vehicle upon a highway at a time when his/her driving privilege was suspended and revoked for a reason other than one listed in Section 14601 and 14601.2 of the Vehicle Code, to wit, FAILURE TO APPEAR, and when he/she had knowledge of such suspension and revocation.

* * * * *

COUNT 4

On or about May 31, 2000, in the County of Los Angeles, the crime of DRIVING WITHOUT EVIDENCE

APPENDIX F

MUNICIPAL COURT OF LONG BEACH
JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

CASE NO. NA45170

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

01 STEVE SIMPILO (6/20/1949), AND
02 NOPRING PAULINO PENULIAR (11/11/1979),
DEFENDANT(S)

FELONY COMPLAINT

The undersigned is informed and believes that:

COUNT 1

On or about May 31, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE #3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

|NOT VALID WITHOUT PAGE TWO OF CR-290 ATTACHED|

|Not to be used for multiple count convictions or for 1/3 consecutive sentences.|

[ ] SUPERIOR COURT OF CALIFORNIA COUNTY OF: LOS ANGELES [ ] MUNICIPAL BRANCH OF JUDICIAL DISTRICT: SOUTHEAST		
PEOPLE OF THE STATE OF CALIFORNIA vs DOB: 11-01-79 DEFENDANT: PENULIAR, NOPRING PAULINO AKA XXX BOOKING # 6639791 [ ] NOT PRESENT		VA 062071 -A -B -C
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT	[ ] AMENDED ABSTRACT	-D

DATE OF HEARING	DEPT NO.	JUDGE
12-13-00	SE S	L.S. KNUPP

CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER
E. CASSIDY	L. PERALTA	X 1762327

COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	
M. GROSBARD	L. MEND	[ ] APPTD.

1. Defendant was convicted of the commission of the following felonies:

[ ] Additional counts are listed on attachment

_____ (number of pages attached)

CON-VICTED BY	Term (L, M, U)	Count	Consecutive 1/3 Violent	Consecutive 1/3 Non-violent	Consecutive Full Term	Incomplete Sentence (refer to item 5)	654 Stay	PRINCIPLE OR CONSECUTIVE TIME IMPOSED

CNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/ YEAR)	jury	court	plea							YRS.	MOS.
2	VC	10851(A)	UNLAWFUL TAKE V.	00	12/13/00			X	U						3	0
3	VC	2800.2(A)	EVADE OFFICER	00	12/13/00			X	U	X					(3	0)
					/ /											
					/ /											
					/ /											

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENTS	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes)

5. INCOMPLETE SENTENC(S) CONSECUTIVE

COUNTY	CASE NUMBER

6.

TOTAL TIME ON ATTACHED PAGES

7. [ ] Additional indeterminate term (see CR-292).

8.

TOTAL TIME	3	0

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

(Continued on reverse)

ABSTRACT OF JUDGMENT–PRISON COMMITMENT–DETERMINATE
(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

PEOPLE OF THE STATE OF CALIFORNIA VS. DEFENDANT: PENULIAR, NOPRING PAULINO			
-A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $200.00 per PC 1202.4(b) forthwith per PC 2085.5
   b. RESTITUTION FINE of: $200.00 per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $_____ per PC 1202.4(f) to [X] victim(s)* [ ] Restitution Fund
   (*List victim name(s) if known and amount breakdown in item 11, below.)
   (1) [ ] Amount to be determined.
   (2) [ ] Interest rate of: _____% (not to exceed 10% per PC 1204.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.7(a).
   f. [ ] FINE of $ _____ per PC 1202.5

10. TESTING:
   a. [ ] AIDS pursuant to [ ] PC 1202.1 [ ] other (specify):
   b. [ ] DNA pursuant to [ ] PC 290.2 [ ] other (specify):

11. Other orders (specify):

12. Execution of sentence imposed

   a. [XX] at initial sentencing hearing. d. [ ] at resentencing per recall of commitment. (PC 1170(d).)
   b. [ ] at resentencing per decision on appeal. e. [ ] other (specify):
   c. [ ] after revocation of probation.

13. CREDIT FOR TIME SERVED

CASE NUMBER	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
VA 06207 -A	0	0	0 [ ] 4019 [ ] 2933.1
-B			[ ] 4019 [ ] 2933.1
-C			[ ] 4019 [ ] 2933.1
-D			[ ] 4019 [ ] 2933.1
DATE SENTENCE PRONOUNCED: 12-13-00	SERVED TIME IN STATE INSTITUTION: [ ] DMH	[ ] CDC	[ ] CRC

14. The defendant is remanded to the custody of the sheriff [XX] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to [XX] the reception center designated by the director of the California Department of Corrections.
[ ] other (specify):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
/s/ Illegible	APR 25 2001

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

APPENDIX H

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. VA06207

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

01 NOPRING PAULINO PENULIAR (11/11/1979)
(BK# 6639791), AKA ALEXIS DELACRUZ, DEFENDANT(S)

[Filed: Nov 21, 2000]

Arraignment Hearing
Date: 11/21/2000
Department: SE S

INFORMATION
SUMMARY

Ct. No.	Charge	Charge Range	Defendant	Special Allegation	Alleg. Effect
1	PC 487(d)	16-2-3	PENULIAR, NOPRING	PC 666.5	2-3-4 Yrs
2	VC 10851(a)	16-2-3	PENULIAR, NOPRING	PD 666.5	2-3-4 Yrs
3	VC 2800.2(a)	16-2-3	PENULIAR, NOPRING		
4	VC 20002(a)	6 Mo.	PENULIAR, NOPRING		
5	PC 148(a)(1)	1 Yr.	PENULIAR, NOPRING		

The District Attorney of the County of Los Angeles, by this Information alleges that:

COUNT 1

On or about October 18, 2000, in the County of Los Angeles, the crime of GRAND THEFT AUTO, in violation of PENAL CODE SECTION 487(d), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully take an automobile, 1995 FORD VAN.

* * * * *

COUNT 2

On or about October 18, 2000, in the County of Los Angeles, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did unlawfully drive and take a certain vehicle, to wit, 1995 FORD VAN, LIC. #3LTC412, then and there the personal property of ARLENE DEOCADES without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

* * * * *

COUNT 3

On or about October 18, 2000, in the County of Los Angeles, the crime of EVADING AN OFFICER, WILLFUL DISREGARD, in violation of VEHICLE CODE SECTION 2800.2(a), a Felony, was committed by NOPRING PAULINO PENULIAR, who did willfully and unlawfully, while operating a motor vehicle and with the intent to evade, flee and otherwise attempt to elude a pursuing peace officer's motor vehicle while all the following conditions existed: the peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the defendant(s) saw and rea-

sonably should have seen the lamp, the peace officer's motor vehicle was sounding its siren as was reasonably necessary, the peace officer's motor vehicle was distinctively marked, the peace officer's motor vehicle was operated by a peace officer.

It is further alleged that the defendant(s) drove with a willful wanton disregard for the safety of persons and property.

* * * * *

COUNT 4

On or about October 18, 2000, in the County of Los Angeles, the crime of HIT-RUN DRIVING, in violation of VEHICLE CODE SECTION 20002(a), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who was the driver of a vehicle involved in an accident resulting in damage to property, who did unlawfully fail to stop the vehicle at the scene of the accident and comply with subsection(s) (1) of Vehicle Code section 20002(a).

* * * * *

COUNT 5

On or about October 18, 2000, in the County of Los Angeles, the crime of RESIST, OBSTRUCT, DELAY OF PEACE OFFICER OR EMT, in violation of PENAL CODE SECTION 148(a)(1), a Misdemeanor, was committed by NOPRING PAULINO PENULIAR, who did willfully and unlawfully resist, delay and obstruct DEPUTY POWELL who was then and there a peace officer attempting to and discharging the deputy of his/her office and employment.

It is further alleged pursuant to Penal Code section 666.5 as to count(s) 1 and 2 that the defendant(s), NOPRING PAULINO PENULIAR was previously convicted of a violation of California VEHICLE Code Section 10851 on JUNE 30, 2000 in the Superior Court of LOS ANGELES County.

* * * * *

APPENDIX I

U.S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VA

File No.: A44 948 659

IN THE MATTER OF
NOPRING PAULINO PENULIAR, APPELLANT

IN REMOVAL PROCEEDINGS

APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Whether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and therefore, ineligible for relief under § 240A(a) of the Immigration and Nationality Act (hereinafter INA)?

2. Whether the Immigration Judge erred in finding Appellant ineligible for any relief under the INA?

STATEMENT OF PROCEEDINGS

On or about April 23, 2002 The Immigration and Naturalization Service (hereinafter INS) issued a Notice to Appear (hereinafter NTA) against Appellant charging he was removable under § 237(a)(2)(A)(iii) of the INA as an aggravated felon as defined in § 101(a)(43)(S) of the INA as having been convicted of an obstruction of justice offense and a term of imprisonment for at least one year. The NTA alleged

Appellant to be a native and citizen of the Philippines not a citizen or national of the United States who was admitted to the United States on or about June 21, 1995 as an immigrant. The NTA further alleged a June 30, 2000 conviction for unlawfully taking a vehicle in violation of § 10851(a) of the California Vehicle Code and a sentence of 2 years. The NTA further alleged a December 13, 2000 conviction for unlawfully taking a vehicle in violation of § 10851(a) of the California Vehicle Code and a sentence of 3 years. The NTA further alleged a December 13, 2000 conviction for evading an officer in violation of § 2800.2(a) of the California Vehicle Code and a sentence of 3 years.

On or about May 29, 2002, the matter was set to a bond hearing on June 18, 2002. Following a denial of bond the matter was set to July 10, 2002. On July 10, 2002, the matter was continued to July 17, 2002. On July 11, 2002, the INS issued an additional charge of inadmissibility charging Appellant was an aggravated felon under § 101(a)(43)(F) and (G) of the INA. On July 17, 2002 the INS issued another additional charge of inadmissibility charging Appellant to being an aggravated felon under § 101(a)(43)(G) as having been convicted of a theft offense for, which the term of imprisonment is at least one year. On July 17, 2002 an individual hearing was scheduled for October 30, 2002.

On or about October 30, 2002, an individual hearing was held before the Honorable Dennis R. James, Immigration Judge. The Immigration Judge held, based on the conviction documents, Appellant had been convicted as alleged in the NTA and was an aggravated felon having been convicted of a theft crime and sentenced to over 1 year and as having been convicted of a crime of violence and sentenced to over one year.

The Immigration Judge denied Appellant's application for cancellation of removal and ordered him removed. Appellant reserved appeal. A timely appeal was filed from the decision of the Immigration Judge and this brief is in support of that appeal.

STATEMENT OF FACTS

Appellant is a 23 year old, single, male, native and citizen of Philippines who entered the United states as alleged in NTA on June 21, 1995 as an immigrant at the age of 15 years old. Appellant's family ties in the United States include his mother who is a naturalized United States citizen and four siblings, three of which are lawful permanent residents and one of whom is a United States citizen. Appellant also has a United States citizen daughter with his domestic partner, who is also a United States citizen. It was determined Appellant had been convicted as alleged in the NTA.

ARGUMENT I

THE IMMIGRATION JUDGE ERRED IN FINDING NO RELIEF AVAILABLE TO APPELLANT

Appellant contends because there are individuals, which remain eligible for relief under § 212(c) of the INA in exclusion or deportation setting, the unavailability of relief violates the equal protections clause in the United States Constitution and violates Appellant's due process rights. The Fifth Amendment of the United States Constitution stated:

> No person shall be deprived of life, liberty or property without due process of law.

The Fifth Amendment applies to lawful permanent residents such as Mr. Penuliar as he is a "person"

whose life, liberty and property interest are protected by the United States Constitution as equally as that of a United States citizen. It is true Congress is vested with plenary powers over matters concerning aliens pursuant to Article I of the Constitution. However, the plenary power is not an absolute power. The Supreme Court stated that "it is well established that the Fifth Amendment entitled aliens to due process of law deportation proceedings". *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439, 1449, 123 L. Ed. 2d 1 (1993).

The recently enacted aggravated felony definition is now said to be retroactive to all acts committed "before, on or after September 30, 1996". Appellant contends the disparate treatment between those individuals who were previously in deportation or exclusion proceedings for similar criminal acts who are now in removal proceedings and denied relief, violates equal protection under the law.

CONCLUSION

For the reasons stated above, and others that may be apparent to the Board, Appellant respectfully requests the Board determine he is not removable as an aggravated felon and remand this matter for consideration of relief in the form of cancellation of removal under § 240A(a) of the INA.

Respectfully submitted,

CARDENAS & FIFIELD, A.P.C.

DATE: 2/25/03 /s/ RUDY CARDENAS, JR.
RUDY CARDENAS, JR.
Attorney for Respondent

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Notice of Appeal from a Decision of an Immigration Judge

1.

Staple Check or Money Order Here. Include Name(s) and "A" number(s) on the face of the check or money order.	List Name(s) and "A" Number(s) of all Respondent(s)/Applicant(s): Nopring Paulino PENULIAR A44 948 659

2. I am the [X] Respondent/Applicant [ ] INS (*Mark only one box.*)

3. I am [X] DETAINED [ ] NOT DETAINED (*Mark only one box.*)

4. My last hearing was at El Centro, CA (*Location, City State*)

5.

What decision are you appealing?

Mark only one box below. If you want to appeal more than one decision, you must use more than one Notice of Appeal (Form EOIR-26)

[x] I am filing an appeal from the Immigration Judge's decision in ***merits*** *proceedings* (example: removal, deportation, exclusion, asylum, et c.) dated October 30, 2002.

[ ] I am filing an appeal from the Immigration Judge's decision in ***bond*** *proceedings* dated _____.

[ ] I am filing an appeal from the Immigration Judge's decision ***denying a motion to reopen or a motion to reconsider*** dated _____.

(Please attach a copy of the Immigration Judge's decision you are appealing.)

6.

State in detail the reason(s) for this appeal. Please refer to the Instruction at part F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.

The Immigration Judge erred in ruling the crimes I was convicted of were aggravated felonies. It is believed and alleged removability was not established by clear and convincing evidence. In addition, the Immigration Judge should have allowed me to have an application for relief adjudicated. I am appealing the decision of the Immigration Judge for the following reasons:

1. It is not clear that the crimes set out in the Notice to Appear are aggravated felonies. It is, therefore, not clear that removability had been established by clear and convincing evidence. If the Judge had properly ruled that the crimes in the Notice to Appear were not aggravated felonies, I would have been eligible to apply for cancellation of removal or 212(c) relief.

2. It is believed there is current legislation in Congress to allow persons to apply for cancellation of removal as long as they were not sentenced to more than five years for an aggravated felony. We are appealing the denial of cancellation because in the future legislation will allow a person to apply for cancellation as long as the person was not sentenced to more than five years for an aggravated felony. Consequently, it is believed the crimes committed

SEE ADDENDUM

(Attached additional sheets if necessary)

7. Do you desire oral argument before the Board of Immigration Appeals? [ ] Yes [X] No

8. Do you intend to file a separate written brief or statement after filing this Notice of Appeal? [X] Yes [ ]No

[redacted]

9.

SIGN HERE →

x /s/ Nopring Penuliar
Signature of Person Appealing
(or attorney or representative)

11/25/02
Date

64a

10.

Mailing Address of Respondent(s)/Applicant(s)

NOPRING Paulino PENULIAR
(Name)

c/o 1115 N. Imperial Avenue
(Street Address)

(Apartment or Room Number)

El Centro, CA 92243
(City, State, Zip Code)

None
(Telephone Number)

11.

Mailing Address of Attorney or Representative for the Respondent(s)/Applicant(s)

Rudy Cardenas, JR.
(Name)

1030 Broadway
(Street Address)

Suite 108
(Suite or Room Number)

El Centro, CA 92243
(City, State, Zip Code)

(760) 353-5710
(Telephone Number)

[redacted]

[redacted]

12.

PROOF OF SERVICE
(You Must Complete This)

I Nopring Paulino PENULIAR mailed or delivered a copy of this Notice of Appeal

on 11/25/02 to INS Assistant District Counsel

at 1115 N. Imperial Avenue, El Centro, CA 92243
(Address of Opposing Party)

✍ SIGN HERE

X Paulino Penuliar
Signature

[redacted]

[redacted]

[ ] Read all of the General Instructions
[ ] Provided all of the requested information
[ ] Completed this form in English
[ ] Provided a certified English translation for all non-English attachments

HAVE YOU?

[ ] Signed the form
[ ] Served a copy of this form and all attachments on the opposing party
[ ] Completed and signed the Proof of Service
[ ] Attached the required fee or Fee Waiver Request

ADDENDUM TO FORM EOIR-26
RE: Nopring PENULIAR, A44 948 659

QUESTION #6

even if they are aggravated felonies, the sentence was not more than five years for each conviction.

3. I believe currently there are still persons who are allowed to apply for 212(c) in exclusion proceedings. The amendment to 212(c) by the Anti-Terrorism and Effective Death Penalty Act violates the protection afforded through the due process clause of the Constitution of the United States and denies me equal protection of the laws. It is believed that *Francis v. INS*, 532, F.3d 286 (2d Cir. 1976) *Matter of Silva*, I & N Dec. 26, (BIA 1976), would allow me to have my application for relief adjudicated before the Immigration Judge. I believe this disparate treatment had already been addressed in *Francis*, *Silva*, and *Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991), and, therefore, the Immigration Judge does have authority to follow the decision even though they contain the question of constitutional law. I believe the Immigration Judge should not declare the new section 212(c) unconstitutional, but rather he should follow the above precedents and rule that 212(c) is available in deportation proceedings as well as in exclusion proceedings.

4. I cannot believe that I am not entitled to relief from deportation. The fact that I have resided in the United States since my first entry on June 12, 1995 should have allowed me to remain in the United States. The fact that I have a U.S. citizen mother, Prudencia

Penuliar and three brothers who are legal permanent residents and a sister who is a U.S. citizen should have allowed me to stay in the United States. All my brothers and sisters are in the United States. I cannot believe the Immigration Judge does not have the ability to allow me to stay in the United States since I have been a long time resident of the United States.

All the reasons above, by themselves are in total sufficient to overrule the decision of the Immigration Judge ordering me removed to Mexico. I believe the decision of the Immigration Judge ordering me removed to Mexico should be reversed and the BIA should remand proceedings to allow adjudication of cancellation of removal under § 240A(a), termination or 212(c) relief since removability has not been established.

Supreme Court, U.S.
FILED
AUG 23 2006
CLERK

(2)

No. 05-1630

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

NOPRING PAULINO PENULIAR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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August 23, 2006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the court of appeals correctly apply *Taylor v. United States* to conclude that California Vehicle Code Section 10851(a) (Unlawful Taking of a Vehicle), which includes as principal offenders aiders and abettors and accessories after the fact, is not categorically a "theft offense" under the United States Immigration and Nationality Act?

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Nopring Paulino Penuliar respectfully submits this opposition to the Attorney General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In his Petition ("Pet."), the Attorney General asks this Court to grant certiorari in the separate case of *Gonzalez v. Duenas-Alvarez*, No. 05-1629, and to hold this case pending resolution of *Duenas-Alvarez*. Pet. at 8-9.[1] The petition for certiorari should be denied.

First, there is no conflict among the circuit courts on the question presented by Petitioner. The cases allegedly creating a conflict in "analytically indistinguishable circumstances," Pet. (*Duenas-Alvarez*) at 11, involve neither the Immigration and Nationality Act ("INA") nor criminal "theft offenses," let alone criminal statutes remotely similar to the California vehicle theft statute at issue here. *Id.* at 11-14. But even if cases involving matters such as the federal sentencing guidelines could create a legitimate conflict with the application of the INA in this case, the Ninth Circuit recently granted *en banc* review to address a sentencing guidelines decision that reaches the same result as the circuit decisions that the Attorney General contends are in conflict with this case. *United States v. Vidal*, 426 F.3d 1011 (9th Cir. 2005), *vacated by grant of reh'g en banc*, 453 F.3d 1114 (9th Cir. 2006). Thus, even if the Petition were correct in alleging a circuit conflict – and it is not – at most, there would be an

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[1] The Attorney General's Petition for a Writ of Certiorari in *Gonzales v. Duenas-Alvarez*, filed with this Court on June 22, 2006, is cited herein as "Pet. (*Duenas-Alvarez*)." Because the Attorney General provided no substantive argument for a grant of certiorari in this case, instead asking for this case to be held in light of his petition in *Duenas-Alvarez*, citations to the arguments raised by the Petitioner are made to the Petition in *Duenas-Alvarez*.

intra-circuit conflict that should be, and is being, addressed in the first instance by the *en banc* court of appeals. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (Harlan, J.) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself").

Nor is there a pressing need to resolve the issue presented in this case. As noted, there is no conflict among the courts of appeals. Further, as the government admits, both the Senate and the House of Representatives have passed legislation that would address the question presented in the petition by expanding the INA's definition of "aggravated felony" to include, inter alia, "aiding [and] abetting . . . an offense" that qualifies as an "aggravated felony." Pet. (*Duenas-Alvarez*) at 21-22 (internal quotation omitted). As such, a ruling by this Court interpreting the scope and meaning of the INA might have limited, if any, continuing significance in light of this pending legislation.

Even were the issue presented in the petition urgent, however, this case is not an appropriate vehicle for resolving that issue. This case involves a California statute that uniquely includes as principals traditional accessories after the fact. Pet. App. 30a. Because this statute includes accessories after the fact, this Court could affirm the decision of the court of appeals based on the broad scope of the statute without ever reaching the "aiding and abetting" issue identified by Petitioner. Further, the Attorney General himself argues that there is a threshold jurisdictional question that potentially could prevent the Court from resolving this case on the merits. Pet. 8-9. The Petition does not suggest that this threshold question is independently worthy of this Court's review. *Id.* Indeed, the threshold question of exhaustion identified by the Petition involves a fact-intensive review of the record that the Attorney General contends calls

into question the jurisdiction of the court of appeals. In short, this is not a proper vehicle to resolve the question presented.

Nor should this case be held pending the resolution of *Duenas-Alvarez*, because certiorari should be denied in that case, as well. In addition to the reasons set forth above, review of the court of appeals' decision in *Duenas-Alvarez* would be inappropriate because that case was remanded back to the Board of Immigration Appeals ("BIA") to apply the second prong of the two-part approach set forth by this Court's settled precedent. The interlocutory nature of that decision is itself a basis for denying review. *E.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That is particularly so where there is no conflict among the courts of appeals, there is, at most, an intra-circuit conflict for which rehearing *en banc* has been granted, and there is pending legislation passed by both houses of Congress that, if enacted, could render any ruling meaningless in future cases. *Id.*; *see also, e.g.*, *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

Finally, certiorari should be denied because there is no allegation that the decision below conflicts with any decision of this Court. To the contrary, the court of appeals' decision was substantively correct, as it faithfully applied the approach set forth in this Court's cases to the specific language and structure of Section 10851(a) of the California Vehicle Code.

A. Factual Background

Nopring Paulino Penuliar is a native and citizen of the Philippines who legally immigrated to the United States on June 12, 1995, when he was 15 years old. Form EOIR-4, (filed July 17, 2002) (A.R. 67-74). Mr. Penuliar has extensive family ties in the United States. His daughter Marilyn, a United States citizen, was born on March 16, 1998 to Mr. Penuliar's domestic partner, Glenda Alejo, also a

United States citizen. *Id.* (A.R. 70). Additionally, Mr. Penuliar's mother Prudencia is a United States citizen. *Id.* Mr. Penuliar also has four siblings, Gelacio, Virgilio, Dora, and John, who are all lawful permanent residents of the United States. *Id.* (A.R. 70, 74).

As is relevant here, on June 30, 2000, Mr. Penuliar pled guilty in the State of California to the Unlawful Taking of a Vehicle under California Vehicle Code Section 10851(a) ("Unlawful Taking of a Vehicle"). Pet. App. 42a-44a. He was sentenced on December 13, 2000 to two years imprisonment for this offense. *Id.* Also on December 13, 2000, Mr. Penuliar pled guilty in the State of California to a second charge of the Unlawful Taking of a Vehicle, as well as a charge of Evading an Officer under California Vehicle Code Section 2800.2(a) ("Evading an Officer"). *Id.* at 48a-52a. He was sentenced to three years imprisonment for each charge, to be served concurrently. *Id.*

B. Statutory Background

Aggravated Felonies Under the INA. Under the INA, several classes of immigrants legally present in the United States are nonetheless subject to removal. 8 U.S.C. § 1227(a). They include individuals who have been convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines aggravated felony to include a long list of various types of offenses, including "a theft offense" and "a crime of violence." 8 U.S.C. § 1101(a)(43)(F) & (G). The INA expressly provides that an aggravated felony includes "an attempt or conspiracy to commit an offense described in this paragraph," but nowhere states that the definition includes aiding and abetting the commission of such an offense. 8 U.S.C. § 1101(a)(43)(U).[2]

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[2] Both the House and Senate have passed bills that would amend the INA to add language expanding the definition of "aggravated felony" to include "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in

To decide whether a particular offense constitutes an aggravated felony under one of the categories listed in the INA, the courts of appeals use a two-step approach. This system was promulgated by this Court in *Taylor v. United States* with regard to the list of offenses included in the Armed Career Criminal Act. 495 U.S. 575, 599-602 (1990) (interpreting 18 U.S.C. § 924(e)); *see, e.g., Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-88 (9th Cir. 2003). Under *Taylor*, a reviewing court first assumes a "categorical" approach, comparing the statute at issue to the "generic" definition of the category of offense in the INA. The generic definition is determined by reference to state law, and should "correspond[] to the definition[] of [the category of offense] in a majority of the States' criminal codes." 495 U.S. at 589.

If all conduct covered by the statute at issue is also covered by the generic definition, then a conviction under that statute is categorically a conviction for an aggravated felony under the INA. If, however, the statute also covers conduct outside the generic definition, then courts assume a "modified categorical" approach, wherein they review the record to determine whether the conviction of the individual in question still falls within the generic definition.

California's Unlawful Taking of a Vehicle Statute. Under California law, a person violates Section 10851 of the Vehicle Code if he "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner

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this paragraph." Border Protection, Antiterrorism, and Illegal Immigrant Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); *see also* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006) (amending § 1101(a)(43(U) to define "aggravated felony" to include "aiding or abetting an offense described in this paragraph, or soliciting, counseling, procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense").

thereof of his or her title to or possession of the vehicle." Cal. Veh. Code § 10851(a). A person may also be guilty under the statute if he "is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing." *Id.* California criminal law usually distinguishes between principals and those who assist a principal after the offense is committed. Cal. Penal Code § 31. The presence of the term "accessory" in Section 10851(a) of the Vehicle Code, however, allows an individual to be convicted as a principal even if that person engaged in conduct generally relegated to the separate offense traditionally referred to as accessory after the fact. *See* Cal. Penal Code § 32; *see also* Pet. App. 14a ("§ 10851(a) includes accessory or accomplice liability.").

C. Procedural Background

Initial Removal Proceedings. On April 23, 2002, while Mr. Penuliar was serving his sentence in state prison, the Immigration and Naturalization Service ("INS") served him with a Notice to Appear, which charged that he was removable under Section 237(a)(2)(A)(iii) of the INA because he had been convicted of "an offense relating to obstruction of justice, perjury or subornation of perjury, or the bribery of a witness," an aggravated felony under 8 U.S.C. § 1101(a)(43)(S). Pet. App. 36a. In July 2002, the INS added additional charges of deportability, alleging that Mr. Penuliar had been convicted of "a crime of violence," an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), and "a theft offense," an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Form I-261, (filed July 11, 2002) (A.R. 102); Form I-862, (filed July 17, 2002) (A.R. 104).

Immigration Judge Dennis R. James (the "IJ") held that Mr. Penuliar's conviction for Evading an Officer was not an obstruction of justice offense, and thus not an aggravated felony under INA Section 101(a)(43)(S). Pet. App. 39a. However, the IJ ruled that Mr. Penuliar's conviction for Evading an Officer was a "crime of violence" under INA Section 101(a)(43)(F), and that Mr. Penuliar's convictions for

Unlawful Taking of a Vehicle were "theft offenses" under INA Section 101(a)(43)(G). *Id.* at 39a-40a. The IJ thus concluded that these convictions were for aggravated felonies, and therefore that Mr. Penuliar was removable as an alien convicted of an aggravated felony. Mr. Penuliar filed a timely appeal with the BIA on November 25, 2002. *Id.* at 62a-64a. In a summary order, the BIA approved the decision of the IJ. *Id.* at 34a.

Court of Appeals Proceedings. The court of appeals reversed, holding that none of the convictions was for an aggravated felony under the INA. Pet. App. 3a. The court held that evading an officer was not categorically a "crime of violence" because the California statute did not contain a *mens rea* element. *Id.* at 7a-10a. As is relevant here, the court of appeals also held that the Unlawful Taking of a Vehicle was not categorically a "theft offense" because the California statute is broadly written to encompass all classes of accessories and accomplices, and thus does not require an individual to exercise control over the vehicle in question. *Id.* at 12a-15a. Likewise, the court concluded that the INS had failed to meet its burden of establishing that Mr. Penuliar's individual convictions were for conduct narrower than that set forth in the broad California statues. *Id.* at 10a-12a, 15a-17a.

The Attorney General petitioned for rehearing and rehearing *en banc* on the issue of whether the Unlawful Taking of a Vehicle was a "theft offense." Petition for Reh'g at 1 (filed Mar. 11, 2005). The Attorney General further argued that Mr. Penuliar had failed to exhaust his administrative remedies before the BIA on this issue. *Id.* at 2. The court of appeals denied the Attorney General's petition. Pet. App. 2a-3a.

On June 29, 2006, the Ninth Circuit granted *en banc* review of a panel decision holding that the Unlawful Taking of a Vehicle under California Vehicle Code Section 10851(a) constitutes a "theft offense" for purposes of increasing a sentence under the federal sentencing guidelines. *United*

States v. Vidal, 426 F.3d 1011 (9th Cir. 2005), *vacated by grant of reh'g en banc*, 453 F.3d 1114, 1115 (9th Cir. 2006).

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied.

First and foremost, no conflict in authority among the circuit courts exists on the question presented by Petitioner. Sup. Ct. R. 10(a). Indeed, no other circuit court has yet directly addressed whether a violation of Section 10851(a) of the California Vehicle Code should qualify, as a categorical matter, as a "theft offense" for purposes of the INA. The circuit cases cited by the government do not involve removal under the INA, and do not even involve purported "theft offenses," let alone the specific state statute at issue here.

But even if there could be a conflict between this INA case and the various federal sentencing cases identified by the Attorney General, the Ninth Circuit recently granted *en banc* review to address the purported intra-circuit conflict on this issue. As such, there is no need for this Court to review a case that, at most, involves an intra-circuit conflict that is being resolved in the first instance by the Ninth Circuit.

Additionally, legislation passed by both houses of Congress could render the question presented by Petitioner moot in future cases. Given this pending legislation, there is no need for the Court to grant plenary review when Congress itself is considering the same issue advanced by petitioner in an area – immigration – where this Court grants substantial deference to the views of Congress. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"). Indeed, in light of this pending congressional action, any ruling by this Court might have limited continuing significance. Under these circumstances, there is no need for this Court to expend its resources on review at this time.

Moreover, even should the Court determine that the question presented by Petitioner (whether "aiding and abetting" is included in the definition of "theft offense" for purposes of the INA) is ready for and might warrant review in an appropriate case, this is an improper vehicle to resolve that question. First, the statute at issue in this case not only criminalizes "aiding and abetting," but also extends to include traditional accessories after the fact as principal offenders. The breadth of this statute is well outside the mainstream, and thus is broader than the generic modern definition of "theft offense" even if "theft offense" were deemed to include aiders and abettors generally. Accordingly, this case does not squarely implicate the issue presented by Petitioner.

Nor does the Attorney General dispute that this case is an improper vehicle to resolve this conflict. Specifically, he argues that the court of appeals lacked jurisdiction due to Mr. Penuliar's alleged failure to exhaust his administrative remedies. While Mr. Penuliar disputes any suggestion that he did not exhaust his remedies, Petitioner's stated intent to raise this threshold "jurisdictional" issue also renders this case an inappropriate vehicle for this Court's review. Because Petitioner argues that this issue affects the jurisdiction of the court of appeals, this Court would be required to engage in a fact-intensive inquiry on this antecedent issue before it could even consider the merits of the question presented.

Petitioner's suggestion that this Court hold this petition pending review in *Duenas-Alvarez* is also untenable because *Duenas-Alvarez* is likewise an inappropriate vehicle for review. *Duenas-Alvarez*, another INA "theft offense" case under Section 10851(a) of the California Vehicle Code, suffers from all the flaws rendering this case inappropriate for review (with the exception of the Attorney General's intent to argue failure to exhaust). In addition, *Duenas-Alvarez* is inappropriate for review because the court of appeals' decision in that case is interlocutory. Because the immigration court decision in *Duenas-Alvarez* did not reach

the modified categorical approach, the court of appeals remanded the case to the BIA for further proceedings under the second prong of the *Taylor* analysis. Pet. (*Duenas-Alvarez*) at 6. The interlocutory nature of that petition is therefore sufficient reason for its denial, particularly given the absence of any pressing need to resolve the question presented.

Finally, the decision below was correct. The statute in question, Section 10851(a) of the California Vehicle Code, expressly criminalizes both traditional aiding and abetting and traditional accessory after the fact offenses, which lie outside the modern consensus on the scope of a "theft offense." The statute also incorporates California aiding and abetting law, which likewise includes conduct outside the modern consensus.

I. THIS CASE IMPLICATES NO CONFLICT AMONG THE COURTS OF APPEALS THAT WARRANTS THIS COURT'S REVIEW.

The court of appeals' decision in this case holds that for a conviction to qualify as a theft offense under the INA supporting removal of a lawful permanent resident, the conviction must include a finding that the resident took or exercised control over property not his own. Pet. App. 12a-15a. The court of appeals held that because Section 10851(a) of the California Vehicle Code includes aiding and abetting and accessory (i.e., traditional accessory after the fact) offenders as principals, it does not meet this standard and therefore did not qualify as a "theft offense" under the INA. The court's analysis of Section 10851(a) of the California Vehicle Code did not purport to apply to any of the many other categories of aggravated felonies under the INA, or to any other "aggravated felony" statute. *Id.*

In contrast, not one of the cases cited by Petitioner addresses the requirements for a "theft offense," or even the requirements for deporting a lawful permanent resident under

the INA. Pet. (*Duenas-Alvarez)* at 10-15. Specifically, in *United States v. Mitchell*, the First Circuit ruled that a "crime of violence" under the Bail Reform Act ("BRA") includes aiding and abetting arson. 23 F.3d 1, 2-3 (1st Cir. 1994). In *United States v. Hathaway*, the Second Circuit held that a "violent felony" under the Armed Career Criminal Act (the "ACCA") includes aiding and abetting arson. 949 F.2d 609, 611 (2d Cir. 1991). In *United States v. Groce*, the Seventh Circuit similarly determined that the ACCA's "violent felony" provision included aiding and abetting burglary. 999 F.2d 1189, 1192 (7th Cir. 1993).

Finally, in *United States v. Baca-Valenzuela*, the Eighth Circuit ruled that aiding and abetting the possession of narcotics with the intent to distribute constituted a "drug trafficking crime" warranting an enhancement under the federal Sentencing Guidelines for an offender convicted of the criminal offense of reentry following deportation. 118 F.3d 1223, 1231-33 (8th Cir. 1997). Because none of these cases involves solely the INA or even mentions "theft offenses," there is no conflict among the circuit courts on the issue decided by the court of appeals in this case.

These cases involving the ACCA, the BRA and the Sentencing Guidelines create no conflict with the decision below because these statutes employ different language and serve different purposes than the INA. For instance, the ACCA, at issue in *Hathaway* and *Groce*, provides for enhanced penalties for individuals who have three previous convictions for a "violent felony," defined as "any crime punishable by imprisonment for a term exceeding one year. . . that . . . (ii) is burglary, arson . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The "or otherwise" language in this provision indicates that the examples given – burglary and arson – should be read broadly in the context of risk of physical injury.

Similarly, under the BRA, at issue in *Mitchell*, an individual convicted of a "crime of violence" must generally be held in custody pending sentencing. 18 U.S.C. § 3143(a)(2). The BRA defines a "crime of violence" as including "any other offense that . . . involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 3156(a)(4)(B). Although this statute does not go so far as to include the examples of arson and burglary, its "any other offense" language, like that of the ACCA, expands the scope of this provision to any offense which might involve the use of force against persons or property. A conviction for aiding and abetting burglary or arson would naturally provide a risk of injury, or the use of force against property. Notably, neither the BRA nor the ACCA require that the offender himself use force or directly injure – they simply require that his actions create the risk of injury, or that there be a risk that force "may be used."

Aiding and abetting arson or burglary thus fit naturally within the confines of "crimes of violence" or "violent felonies." Because the INA's definition of "theft offense" contains none of the attributes which create this fit, the three decisions under these statutes cited by the Attorney General are not in conflict with the Ninth Circuit's determination that a violation of Section 10851(a) of the California Vehicle Code is not a theft offense under the INA because a "theft offense" must involve the actual exercise of control over the property in question.

The Attorney General's argument that the decision below conflicts with the Eighth Circuit's decision in *Baca-Valenzuela* is also demonstrably incorrect. In that case, the Eighth Circuit held that aiding and abetting the possession of narcotics with the intent to distribute constitutes a "drug trafficking crime." 118 F.3d at 1231-33. *Baca-Valenzuela*, however, dealt with sentencing under an "aggravated felony" provision of the federal Sentencing Guidelines. *Id.* at 1231-33.

But, as Petitioner notes, the federal Sentencing Guidelines have been amended specifically to include aiding and abetting offenses within the definition of "aggravated felonies." Pet. (*Duenas-Alvarez*) at 13 n.7. Relying upon this very distinction, the Attorney General himself has recently argued to the Ninth Circuit that *Penuliar* does not conflict with cases under the Sentencing Guidelines. Specifically, the Attorney General has explained that cases under the INA do not conflict with cases under the sentencing guidelines, due to the important differences in their statutory language. Thus, in seeking to avoid rehearing *en banc* in *United States v. Vidal*, 426 F.3d 1011, 1015 (9th Cir. 2005), the Attorney General argued that the decision in this case does not conflict with *Vidal*, a sentencing guidelines case, because this case "was not decided in the criminal context; there is no analogue to [the relevant guidelines Application Note] in [the INA]" that expressly provides that an aggravated felony should include "aiding and abetting." Opp'n. to *Vidal en banc* Pet. at 17 n.10, No. 04-50185 (9th Cir. filed Jan. 23, 2006) (emphasis omitted).

Petitioner cannot have it both ways. He cannot argue to the Ninth Circuit that there is no conflict between *Vidal* and this case because the underlying federal statutes differ in meaningful respects, and then argue to this Court that, even though the circuit decisions that he claims are in conflict with this case involved entirely different federal statutes, those decisions arose in "analytically indistinguishable circumstances." Pet. (*Duenas-Alvarez*) at 11. In any event, the court of appeals' decision to grant *en banc* review in *United States v. Vidal* also renders premature any review of this issue in this case.

In *Vidal*, a panel of the Ninth Circuit held that a violation of Section 10851(a) of the California Vehicle Code constitutes a "theft offense" for purposes of increasing a sentence under the federal Sentencing Guidelines. 426 F.3d at 1013. The petitioner in *Vidal* sought *en banc* review, arguing, *inter alia*,

that the panel's decision conflicted with the Ninth Circuit's decision in *Penuliar*. Reh'g Pet. (*Vidal*) at 4, No. 04-50185 (9th Cir. filed Dec. 6, 2005). The court of appeals granted *en banc* review on June 29, 2006. 453 F.3d 1114, 1115 (9th Cir. 2006). Given that the Ninth Circuit is currently reviewing a decision that is alleged to conflict with the decision in this case, it would be premature to grant review here.[3]

As this Court has explained, certiorari is not appropriate to resolve an intra-circuit conflict. *See Davis v. United States*, 417 U.S. 333, 340 (1974). To the contrary, to the extent that there is any conflict between the Ninth Circuit's decisions in this case and in *Vidal*, such a conflict is best resolved through *en banc* review. *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942); *see also* Stern, *supra* § 4.6, at 235. These principles are especially apt in this case because the Ninth Circuit has granted *en banc* review in *Vidal*. In light of the ongoing proceedings in the court of appeals, it would be premature for the Court to grant review in this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO PRESSING NEED FOR THE COURT TO RESOLVE THE QUESTION PRESENTED.

1. There is no pressing need to resolve the issue presented because, as the Attorney General acknowledges, there currently is legislation pending in Congress which may address this issue in future cases. Pet. (*Duenas-Alvarez*) at 21-22. Both houses of Congress have now passed legislation

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[3] Petitioner may argue that because *Vidal* is a sentencing guidelines case, and the *Vidal* panel's majority opinion drew a distinction on this ground, the grant of *en banc* review in *Vidal* does not render review premature in this case. Again, Petitioner cannot have it both ways. Either sentencing-related cases can conflict with INA cases, or they cannot. If they can, then review in this case is unnecessary due to the ongoing proceedings in *Vidal*. If they cannot, then there is no inter-circuit conflict and certiorari is likewise unnecessary.

defining all classes of aggravated felony to include traditional aiding and abetting offenses. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006).[4] It is unclear whether the final text of the provisions would purport to apply retroactively. *Id.* However, should Congress finalize this legislation it may resolve this legal issue for future cases. Given Congress' active consideration of the question presented, there is no need for this Court's intervention to resolve a question that both houses of Congress have addressed through pending legislation.

2. In any event, Petitioner's speculation about the possible effects of the decision below do not provide a reason for granting review. Specifically, Petitioner argues that it will be more difficult to prove that an individual committed an "aggravated felony" under the modified categorical approach than under the categorical approach, and that the court of appeals may apply its decision to different factual and legal circumstances. Pet. (*Duenas-Alvarez*) at 15-22. These arguments should be rejected.

First, the alleged ill effects described by Petitioner boil down to the simple requirement that he meet his burden of proof, as established by this Court, just as he would be required to do in any case under *Taylor*'s modified categorical approach. Petitioner does not contend that this Court should reconsider the two-part framework set forth in *Taylor*, but instead complains that the application of that framework makes it difficult to establish that an individual

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[4] Although these two bills agree as to the aiding and abetting provisions, their other differing provisions have not yet been reconciled in conference committee, and it is still unclear when and if these bills will become law.

has committed an aggravated felony under the INA using the modified categorical approach.[5]

Petitioner thus maintains that there are large numbers of immigrants whom he may not remove due to the decision below. Pet. (*Duenas-Alvarez*) at 15-16. This overstates the impact of the court of appeals' decision. To be sure, the court of appeals ruled that Section 10851(a) is not categorically a "theft offense" under the INA. That ruling, however, does not prevent Petitioner from showing in any other case that an individual's violation of that statute constitutes a theft offense under the modified categorical approach set forth by this Court in *Taylor*. Petitioner has presented no valid reason why meeting his burden of proof in cases subject to the modified categorical approach under *Penuliar* would be more burdensome than a typical modified categorical case.[6]

Additionally, Petitioner dramatically overstates the scope of the decision in this case. Petitioner suggests that the *Penuliar* holding "has few obvious limits" and that the Ninth Circuit's

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[5] Petitioner also argues that this case requires review because he cannot necessarily remove immigrants whose offenses fall outside the INA's aggravated felony provisions under the INA's provision for removal of those who commit crimes involving moral turpitude. Pet. (*Duenas-Alvarez*) at 18-20. This discussion is irrelevant, because each of these provisions is designed to target specific, enumerated offenses: they are not meant to combine to include every existing offense. The fact that an offense does not fall under one provision does not automatically mean that it should be covered by the other.

[6] For example, Petitioner contends that he will have difficulty meeting his burden of proof because the language of indictments and plea colloquies often simply track the language of the statute in question. Pet. (*Duenas-Alvarez*) at 18. Again, however, there is nothing to distinguish theft offenses from any other case under the modified categorical approach approved by this Court: in each such case, the modified categorical approach is applied precisely because the statutory language is broader than the definition of "aggravated felony." Petitioner does not and cannot suggest that indictments and colloquies in non-theft offense cases are less likely to track the language of the statute at issue.

ruling "may well be extended . . . to every crime that is a basis for removal." Pet. (*Duenas-Alvarez*) at 20. But that is pure speculation. The holding in this case was that a violation of Section 10851(a) of the California Vehicle Code does not, as a categorical matter, constitute a "theft offense" for purposes of the INA. The court of appeals has not extended that holding to other contexts, there are logical reasons why the court of appeals might choose not to do so, and, indeed, the court of appeals has already demonstrated its ability and willingness to draw distinctions where appropriate.

As an example, Petitioner speculates that the court of appeals might extend its holding in this case and determine that a "crime of violence," an aggravated felony under the INA, does not include aiding and abetting offenses. Pet. (*Duenas-Alvarez*) at 20-21. The INA defines "crime of violence" by reference to the federal criminal law, specifically 18 U.S.C. § 16. This statute's language tracks the violent crime provisions discussed above, *supra* Section A, and includes "any other offense that . . . involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 16. When given the opportunity to consider this distinct statutory language, the court of appeals may well conclude, as have other circuits, that aiding and abetting offenses fall within its broad sweep. *See United States v. Morrison*, 972 F.2d 269, 271 (9th Cir. 1992) (holding aiding and abetting malicious destruction a "violent felony" under the sentencing guidelines).

In short, Petitioner's speculation that the court of appeals may, in future cases, dramatically expand its holding in this case simply underscores the prematurity of certiorari.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE TO RESOLVE THE QUESTION PRESENTED.

1. The question presented by Petitioner is whether a "theft offense," as defined by the INA, includes aiding and abetting. However, this case, which involves California's Unlawful

Taking of a Vehicle statute, is an inappropriate vehicle for the Court's consideration of this issue because this particular statute criminalizes not only aiding and abetting the underlying crime, but also acting as an accessory after the fact. Pet. App. 14a (explaining that Section 10851(a) "includes accessory or accomplice liability").

As shown below, California's general aiding and abetting offenses are not properly categorized as "theft offenses" under the INA. However, even if they were, Section 10851(a) of the California Vehicle Code would still not constitute, as a categorical matter, a "theft offense" because this statute also applies to "accessories" – defined by California law as traditional accessories after the fact.

Because the California Unlawful Taking of a Vehicle statute includes accessories after the fact, it criminalizes conduct even broader than traditional aiding and abetting liability. As such, a violation of Section 10851(a) of the California Vehicle Code would not be a categorical aggravated felony even if traditional aiding and abetting offenses are "theft offenses" as Petitioner contends. Accordingly, this case is an improper vehicle for resolving the question presented. Stern, *supra* § 4.4, at 231 (explaining that review may be denied where this Court "might be able to decide the case on another ground and thus not reach the point on which there is conflict") (collecting cases).

2. In his Petition, the Attorney General does not contend that the Court should actually grant plenary review in this case. Indeed, the Petition acknowledges that this case is a less-than-ideal candidate for deciding the question presented because the Petitioner contends that Mr. Penuliar failed to exhaust his claims before the BIA, and that this failure deprived the court of appeals of jurisdiction. Pet. 8-9. Mr.

Penuliar disputes that he failed to exhaust his claims.[7] Nevertheless, Petitioner is correct that the existence of a threshold jurisdictional question that may prevent this Court from reaching the merits renders this case an inappropriate candidate for review of the question presented.

3. Nor should this Court hold this case pending resolution of *Duenas-Alvarez*. As explained above, there is no conflict among the courts of appeals and it would be inappropriate to grant review to address what is, at most, an intra-circuit conflict that the court of appeals has agreed to review *en banc*, and regarding which there is pending legislation that has been passed by both houses of Congress. Additionally, *Duenas-Alvarez*, like this case, involves California's Unlawful Taking of a Vehicle statute, which broadly extends criminal liability not only to aiding and abetting but also to accessories after the fact. Pet. App. 14a.

Further, review would be inappropriate in *Duenas-Alvarez* because that case is interlocutory. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Stern, *supra* § 4.18, at 260 ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

Here, the court of appeals has not finally addressed whether Mr. Duenas-Alvarez was convicted of a theft offense under

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[7] Specifically, Mr. Penuliar believes that the record demonstrates that he fully exhausted his administrative remedies before the BIA. *E.g.*, Pet. App. 57a, 63a.

the INA. The immigration judge (and BIA) held that the Unlawful Taking of a Vehicle was categorically a theft offense, and so did not reach a review under the modified categorical approach. Pet. (*Duenas-Alvarez*) App. 1a-2a. Because the court of appeals concluded that the Unlawful Taking of a Vehicle under California law is not categorically a theft offense, it remanded the case for further proceedings to conduct the modified categorical review set forth in controlling precedent. *Id.* This remand renders the court of appeals' decision interlocutory.

Nor is there any reason to depart from the general rule barring review of interlocutory orders. Instead, for the myriad of reasons discussed above, *Duenas-Alvarez* is inappropriate for immediate review by this Court. Accordingly, this case should not be held for *Duenas-Alvarez*.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND IS CORRECT ON THE MERITS.

Petitioner does not contend that the decision below conflicts with any decision of this Court. To the contrary, the decision below faithfully applies this Court's controlling precedent to the specific question of whether Section 10851(a) of the California Vehicle Code categorically qualifies as a "theft offense."

A. Section 10851(a) Of The California Vehicle Code Encompasses Both California Accomplice Liability And Traditional Accessory After The Fact Liability.

California criminal law normally distinguishes between an offense committed by a principal and an offense committed by an accessory. For example, California excludes from the definition of principals those who engage in conduct that commenced after the conclusion of the crime. *See, e.g.*, Cal.

Penal Code § 31; *People v. Verlinde*, 100 Cal. App. 4th 1146, 1158 (2002).

"Accessory," in contrast, is a defined term whose meaning corresponds to the traditional offense of accessory after the fact. Cal. Penal Code § 32. California's accessory statute provides that "[e]very person who, *after a felony has been committed*, harbors, conceals or aids a principal in such felony . . . is an accessory to such felony." *Id.* (emphasis added). The offense of being an accessory under the California statute (an "Accessory") is distinct from aiding and abetting; an Accessory is not liable as a principal. *See id.*; Cal. Penal Code § 31.

Under California law, a person violates Section 10851(a) of the Vehicle Code if he "is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing [of a vehicle not his or her own.]" Cal. Veh. Code § 10851(a) (emphasis added). The statute thus allows an individual to be convicted for the offense whether the person acted as a principal, aider or abettor, or accessory after the fact. *See, e.g., United States v. Innie*, 7 F.3d 840, 852 (9th Cir. 1993). To be convicted under this statute, a person therefore need only have knowingly accepted a ride in a previously illegally acquired car. *People v. Clark*, 251 Cal. App. 2d 868, 874 (1967). The statute is thus broader than California's generic aiding and abetting law.

B. A Majority Of States Recognize That Accessories After The Fact Are Guilty Of A Separate Offense.

Under the *Taylor* categorical approach, a reviewing court compares the scope of the statute at issue to the requirements of the "generic" definition of the category of offense in the INA. The generic definition is determined by reference to state law, and should "correspond[] to the definition[] of [the category of offense] in a majority of the States' criminal codes." 495 U.S. at 589. Thus, a review of the laws of the

various states is required to determine the modern consensus, and thus the proper "generic" definition against which California Vehicle Code Section 10851(a) should be compared. There is no dispute that the court below applied the analytical approach set forth in *Taylor*. And, as shown below, the court properly concluded that Section 10851 is well outside the generic, consensus definition found in the laws of the fifty states. Pet. App. 12a-15a.

A majority of jurisdictions recognize that acting as a principal rather than as an accessory after the fact constitutes a separate offense. States address the issue of accessories after the fact in two primary ways.

First, twenty-one jurisdictions have promulgated separate criminal offenses for events related to the commission of the crime, on the one hand, and accessories after the fact, who provide assistance to the principal after the commission of the crime, on the other hand.[8] These provisions stand in contrast to Section 10851(a) of the California Vehicle Code because the California statute includes as principal offenders both principals and accessories after the fact.

Second, twenty-nine states have abandoned the "accessory after the fact" terminology and instead classify this type of offense as one of "hindering" or "obstruction of justice." 2 W. LaFave, *Substantive Criminal Law*, § 13.6 (2d ed. 2002); *see also* Model Penal Code § 242.1 Explanatory Note for

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[8] To illustrate, Florida statutes provide that "[a]ny person . . . who maintains or assists the principal or an accessory before the fact, or gives the offender any other aid . . . is an accessory after the fact." Fla. Stat. § 777.03(1)(a); *see also* 18 U.S.C. § 3; Cal. Penal Code § 32; Colo. Rev. Stat. § 18-8-105; D.C. Code § 22-1806; Fla. Stat. § 777.03; Idaho Code Ann. § 18-205; Iowa Code § 703.3; La. Rev. Stat. Ann. § 14:25; Md. Code Ann., Crim. Law § 1-301; Mass. Gen. Laws Ann. ch. 274, § 4; Miss. Code Ann. § 97-1-5; Neb. Rev. Stat. § 28-204; Nev. Rev. Stat. § 195.030; N.C. Gen. Stat. Ann. § 14-7; Okla. Stat. tit. 21, § 173; S.D. Codified Laws § 22-3-5; Tenn. Code Ann. § 39-11-411; Vt. Stat. Ann. tit. 13, § 5; Va. Code Ann. § 18.2-19; W. Va. Code § 61-11-6; Wyo. Stat. Ann. § 6-5-202.

Sections 242.1-242.8 (2001).[9] The characterization used by these states reflects the true nature of the crime: conduct that interferes with the processes of government. *Id.* Section 10851(a) of the California Vehicle Code also differs from the law in these states because it treats as principal offenders those who would instead fall under the gambit of obstruction of justice or hindering.[10]

Because under each approach the modern consensus among the states is to recognize the difference between principals and accessories after the fact, Section 10851(a) of the California Vehicle Code is broader than the modern consensus because it makes all classes of offenders guilty of the same offense.

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[9] Ala. Code §§ 13A-10-42 to -10-45; Alaska Stat. § 11.56.770; Ariz. Rev. Stat. Ann. §§ 13-2510 to -2512; Ark. Code Ann. § 5-54-105; Conn. Gen. Stat. §§ 53a-165 to -167; Del. Code. Ann. tit. 11, § 1244; Ga. Code Ann. § 16-10-50; Haw. Rev. Stat. §§ 710-1028 to -1030; 720 Ill. Comp. Stat. Ann. 5/31-4, 5/31-5; Ind. Code § 35-44-3-2; Kan. Stat. Ann. § 21-3812; Ky. Rev. Stat. Ann. §§ 520.120, 520.130; Me. Rev. Stat. Ann. tit. 17-A § 753; Minn. Stat. § 609.495; Mo. Rev. Stat. § 575.030; Mont. Code Ann. § 45-7-303; N.H. Rev. Stat. Ann. § 642:3; N.J. Stat. Ann. § 2C:29-3; N.M. Stat. § 30-22-4; N.Y. Penal Law §§ 205.50 to .65; N.D. Cent. Code § 12.1-08-03; Ohio Rev. Code Ann. § 2921.32; Or. Rev. Stat. § 162.325; 18 Pa. Cons. Stat. § 5105; R.I. Gen. Laws § 11-1-4; Tex. Penal Code Ann. § 38.05; Utah Code Ann. § 76-8-306; Wash. Rev. Code § 9A.76.050; Wis. Stat. § 946.47.

[10] Additionally, two states, Michigan and South Carolina, still follow the common law, which divides guilty parties into principals and various accessories. *See* Mich. Comp. Laws § 750.505; *People v. Cunningham*, 506 N.W.2d 624, 625 (Mich. Ct. App. 1993); S.C. Code Ann. § 17-21-60; *State v. Legette*, 330 S.E.2d 293, 294 (S.C. 1985); *see also generally* Rollins Perkins, *Parties to Crime*, 89 U. Pa. L. Rev. 581, 581 (1941); Susannah Rawl Cole, *Sewing up the Loophole in Accessory After the Fact Crimes*, 50 S.C. L. Rev. 901, 902-03 (1999). The common law also recognizes that accessories after the fact are tainted with a "'different species of guilt.'" Perkins, *supra*, at 589 (quoting 4 *Blackstone's Commentaries* *40).

C. Section 10851(a) Of The California Vehicle Code Is Also Outside The Mainstream In Its Inclusion Of California Aiding And Abetting Law.

None of the fifty states' theft offense statutes expressly includes aiders and abettors or accessories after the fact.[11] However, some states, like California, consider vehicle theft a separate offense from general theft. Of the thirty states with specific vehicle theft statutes or unauthorized use of a vehicle statutes, twenty-six have statutes which do not include aiders and abettors or accessories after the fact.[12] Section 10851(a)

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[11] Ala. Code § 13A-8-2; Alaska Stat. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-103; Cal. Penal Code § 484; Colo. Rev. Stat. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 841; Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; Haw. Rev. Stat. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code § 35-43-4-2; Iowa Code § 714.1; Kan. Stat. Ann. § 21-3701; Ky. Rev. Stat. Ann. § 514.030; La. Rev. Stat. Ann. § 14:67; Me. Rev. Stat. Ann. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws Ann. ch. 266, § 30; Mich. Comp. Laws § 750.356; Minn. Stat. § 609.52; Miss. Code Ann. § 97-17-41; Mo. Rev. Stat. § 570.030; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. § 28-511; Nev. Rev. Stat. § 205.0832; N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.M. Stat. § 30-16-1; N.Y. Penal Law § 155.05; N.C. Gen. Stat. § 14-72; N.D. Cent. Code § 12.1-23-02; Ohio Rev. Code Ann. § 2913.02; Okla. Stat. tit. 21, § 1701; Or. Rev. Stat. § 164.015; 18 Pa. Cons. Stat. § 3921; R.I. Gen. Laws § 11-41-1; S.C. Code Ann. § 16-13-30; S.D. Codified Laws § 22-30A-1; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Vt. Stat. Ann. tit. 13, § 2501; Va. Code Ann. § 18.2-95; Wash. Rev. Code § 9A.56.020; W. Va. Code § 61-3-13; Wis. Stat. § 943.20; Wyo. Stat. Ann. § 6-3-402; *see also* D.C. Code § 22-3211.

[12] Alaska Stat. § 11.46.360; Ariz. Rev. Stat. Ann. § 13-1814; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. § 18-4-409; Conn. Gen. Stat. § 53a-119b; Del. Code. Ann. tit. 11, § 853; Ind. Code § 35-43-4-2.5; Iowa Code § 714.7; Ky. Rev. Stat. Ann. § 514.100; La. Rev. Stat. Ann. § 14:68.4; Md. Code Ann., Crim. Law § 7-105; Mass. Gen. Laws Ann. ch. 266, § 28; Me. Rev. Stat. Ann. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; Nev. Rev. Stat. § 205.2715; N.J. Stat. Ann. § 2C:20-2.1; N.Y. Penal Law § 165.08; N.C. Gen. Stat. § 14-72.2; N.D. Cent. Code § 12.1-23-06; Ohio

of the California Vehicle Code is thus more broad than the scope of theft and vehicle theft statutes within the mainstream.

Petitioner suggests that regardless of the scope of state theft and vehicle theft statutes, there is a modern consensus that traditional aiders and abettors (i.e., accessories before the fact) may be convicted as principals. Pet. (*Duenas-Alvarez*) at 7-8. This argument misses the mark, however, because Congress has chosen not to apply this treatment to "aggravated felonies" under the INA. The INA contains an express provision including attempt and conspiracy to commit an aggravated felony as "aggravated felonies" themselves. 8 U.S.C. § 1101(a)(43)(U). The INA contains no such provision, however, regarding aiding and abetting. *Id.* This stands in stark contrast to the federal Sentencing Guidelines, which expressly include as "aggravated felonies" not only attempt and conspiracy, but aiding and abetting as well. U.S.S.G. §§ 2L1.2 n.5, 4B1.2 n.1. If Petitioner were correct that due to the modern treatment of accessories before the fact, aiding and abetting is necessarily included in the generic definitions of the offenses which constitute "aggravated felonies," then these provisions in the federal Sentencing Guidelines would be entirely superfluous.

Moreover, even if it were appropriate to look to the various states' definitions of "aiding and abetting" rather than their "theft" offenses, California's general aiding and abetting law is broader than that of the majority of states because it lacks an offense-specific intent requirement. Under California law, "a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime."

Rev. Code Ann. § 2913.03; Okla. Stat. tit. 21, § 1720; 18 Pa. Cons. Stat. Ann. § 3928; S.C. Code Ann. § 16-21-60; S.D. Codified Laws § 22-30A-12; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Wash. Rev. Code § 9A.56.070; *see also* D.C. Code § 22-3215.

People v. Prettyman, 926 P.2d 1013, 1020 (Cal. 1996); *see also Juan H. v. Allen*, 408 F.3d 1262, 1279 n.15 (9th Cir. 2005); *Windham v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998). Thus, under California law, individuals convicted on an aiding and abetting theory "need not have intended to encourage or facilitate the particular offense" of which they are convicted. *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985). This flies in the face of generic aiding and abetting law. *See, e.g., Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Indeed, the majority of states and the federal government have adopted the view that to be convicted under an aiding and abetting theory, an accused must intend to aid the principal in the particular offense.[13]

Both through the statute's express inclusion of traditional accessories after the fact and aiders and abettors as principals, and through the operation of California's atypically broad general aiding and abetting provisions, Section 10851(a) of the California Vehicle Code therefore encompasses conduct that falls outside the modern generic definition of theft offense. The court of appeals thus correctly concluded that the statute is not an "aggravated felony" under the INA.

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[13] At least the following jurisdictions have adopted this view: 18 U.S.C. § 2; Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-301; Ark. Code Ann. § 5-2-403; Colo. Rev. Stat. §§ 18-1-603, 18-8-105; Del. Code Ann. tit. 11, § 271; *T.B. v. State*, 732 So. 2d 1163, 1164 (Fla. 1999); Ga. Code Ann. § 16-2-20; Haw. Rev. Stat. § 702-222; *State v. Gonzalez*, 12 P.3d 382, 384-85 (Idaho Ct. App. 2000); 720 Ill. Comp. Stat. Ann. 5/5-2; Kan. Stat. Ann. § 21-3205; Ky. Rev. Stat. Ann. § 502.020; Mo. Rev. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; *State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997); N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; 18 Pa. Cons. Stat. § 306; *State v. Gazerro*, 420 A.2d 816, 828 (R.I. 1980); S.D. Codified Laws § 22-3-3; Utah Code Ann. § 76-2-202; *State v. Pitts*, 800 A.2d 481, 482-83 (Vt. 2002); Wis. Stat. § 939.05; *Jahnke v. State*, 692 P.2d 911, 921 (Wyo. 1984); *see also generally* Candace Courteau, Comment, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 La. L. Rev. 325, 333 (1998); W. LaFave, *supra*, § 13.2(c).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 23, 2006

REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 6 - 2006
OFFICE OF THE CLERK

No. 05-1630

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 05-1630

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

v.

NOPRING PAULINO PENULIAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent does not deny that, if the Court grants certiorari in *Gonzales* v. *Duenas-Alvarez*, petition for cert. pending, No. 05-1629 (filed June 22, 2006), the petition in this case should be held pending the disposition of that case and then disposed of accordingly. Instead, respondent contends (Br. in Opp. 1-3, 8-26) that the petition in *Duenas-Alvarez* should be denied—and thus that the petition in this case should be denied as well. Respondent is mistaken.

A. The Ninth Circuit's Rule Is Incorrect

1. As the *Duenas-Alvarez* petition demonstrates (at 6-10), the Ninth Circuit erred in holding that aiding and abetting is not included in the generic definition of the term "theft offense" under the "aggravated felony" provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(G). Respondent contends that that holding is correct, because

"[n]one of the fifty states' theft offense statutes expressly includes aiders and abettors or accessories after the fact." Br. in Opp. 24. That is irrelevant even if true, because every State criminalizes aiding and abetting and treats an aider and abettor as a principal, and thus the law in every State is that a defendant who aids and abets a theft offense is guilty of the theft offense itself. See *Duenas-Alvarez* Pet. 6-10.

Respondent also relies (Br. in Opp. 25) on the fact that the INA "contains an express provision including attempt and conspiracy to commit an aggravated felony as 'aggravated felonies' themselves" but "contains no such provision * * * regarding aiding and abetting." Br. in Opp. 25. That reasoning is equally flawed. As explained in the *Duenas-Alvarez* petition (at 22 n.13), attempt and conspiracy, unlike aiding and abetting, are distinct from the underlying offense, and thus would not constitute an aggravated felony unless Congress explicitly so provided. Respondent correctly points out (Br. in Opp. 25) that the Sentencing Guidelines do include aiding and abetting (as well as attempt and conspiracy) in their definition of "aggravated felony." See Sentencing Guidelines § 2L1.2, comment. (n.5). But it is hardly unusual for a legislature (or agency) explicitly to include in a statute (or regulation) a principle of law that would apply even if it were omitted, so as to remove any conceivable doubt. And even if it *were* unusual, the Sentencing Commission's inclusion of particular language in the Guidelines would not be evidence of what *Congress* intended when it enacted the INA—especially since aiding-and-abetting liability is *automatically* included as a form of principal liability under federal statute and the laws of all 50 States, whether or not it is expressly mentioned.

2. Respondent contends (Br. in Opp. 25-26) that, even if aiding and abetting is included in the generic definition of "theft offense," aiding and abetting under California law is

broader than generic aiding and abetting. That theory, however, was not the basis for respondent's argument or the Ninth Circuit's decision below. In any event, it is incorrect. According to respondent, while California holds a defendant responsible for any crime that is the "natural and probable consequence" of the crime he intended to aid and abet, "the majority of states and the federal government" do not. *Id.* at 25-26. As Professor LaFave explains, however, the "established rule" is in fact the one applied in California—that "accomplice liability extends to acts of the principal * * * which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(b), at 361 (2d ed. 2003) (footnote omitted); see *id.* § 13.3(b), at 361-362 nn. 26-29 (citing treatises, state cases, and state statutes).[1]

Respondent also contends (Br. in Opp. 20-23) that, even if aiding and abetting is included in the generic definition of "theft offense," and even if aiding and abetting under California law is no broader than generic aiding and abetting, California Vehicle Code § 10851 (West 2000) imposes liability on an "accessory," which means an accessory after the fact, and an accessory after the fact is not covered by the generic definition of "theft offense" as that term is used in the INA. As explained in the *Duenas-Alvarez* reply brief (at 2-8), that theory, too, was not the basis for the decision below; the theory

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[1] The federal courts of appeals have uniformly interpreted the federal aiding-and-abetting statute, 18 U.S.C. 2, to permit conviction on that theory. See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 637 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 1240 (2003); *United States* v. *Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996); *United States* v. *Miller*, 22 F.3d 1075, 1078-1079 (11th Cir. 1994); *United States* v. *Moore*, 936 F.2d 1508, 1527 (7th Cir.), cert. denied, 502 U.S. 991 (1991); *United States* v. *Graewe*, 774 F.2d 106, 108 n.1 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986); *United States* v. *Barnett*, 667 F.2d 835, 841 (9th Cir. 1982).

is not correct; even if the theory were correct, it would not follow that an alien (like respondent) who was charged with violating Section 10851(a) *as a principal* has not been convicted of a "theft offense" under the "modified categorical" approach; and the Ninth Circuit has applied the rule challenged by the government to California theft statutes that do not include the term "accessory."

B. The Ninth Circuit's Rule Conflicts With The Rule Applied By Other Courts Of Appeals

As the *Duenas-Alvarez* petition demonstrates (at 10-15), the Ninth Circuit's rule that the generic definition of "theft offense" excludes aiding and abetting is inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances.[2] Respondent contends that there is no such conflict, because the statutes at issue in those cases "employ different language and serve different purposes than the INA." Br. in Opp. 11. That contention is mistaken, because the decisions from the other circuits do not rely on particular language or purposes of the statutes at issue; they rely on the basic principle of the criminal law, which the Ninth Circuit ignored, that aiding and abetting and the underlying substantive crime are not distinct offenses.[3] Respondent also contends that the decision below

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[2] Since the petition was filed, the Fifth Circuit has held that aiding and abetting bank fraud is an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *2-*3 (Sept. 5, 2006).

[3] See *United States* v. *Hathaway*, 949 F.2d 609, 610-611 (2d Cir. 1991) (per curiam) ("the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson," and "[a]iding and abetting also supports a substantive conviction for arson under Federal law"), cert. denied, 502 U.S. 1119 (1992); *United States* v. *Groce*, 999 F.2d 1189, 1191 (7th Cir. 1993) ("both federal law and Wisconsin state law punish an aider and

is not inconsistent with the Eighth Circuit's decision in *United States* v. *Baca-Valenzuela*, 118 F.3d 1223 (1997), because that case "dealt with sentencing under an 'aggravated felony' provision of the federal Sentencing Guidelines," which "have been amended specifically to include aiding and abetting offenses within the definition of 'aggravated felonies.'" Br. in Opp. 12-13. That contention is likewise mistaken, because, at the time *Baca-Valenzuela* was decided, the definition of "aggravated felony" in the Guidelines was the same as that in the INA, see 118 F.3d at 1232; the fact that the Guidelines have since been amended does not mean that *Baca-Valenzuela* is no longer controlling in the Eighth Circuit on whether aiding and abetting an aggravated felony is itself an aggravated felony under the INA.

In the alternative, respondent contends (Br. in Opp. 13-14) that it would be premature for this Court to decide whether the generic definition of "theft offense" in 8 U.S.C. 1101(a)(43)(G) includes aiding and abetting, because the Ninth Circuit recently granted rehearing en banc in *United States* v. *Vidal*, 426 F.3d 1011 (2005), rehearing granted, 453 F.3d 1114 (2006). As explained in the *Duenas-Alvarez* reply brief (at 8-10), that contention is mistaken, because *Vidal* does not involve the question presented in this case.[4] Contrary to re-

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abettor as a principal"); *United States* v. *Mitchell*, 23 F.3d 1, 2 (1st Cir. 1994) (per curiam) ("aiding and abetting is not a separate offense from the underlying substantive crime") (internal quotation marks and citation omitted); *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1232 (8th Cir. 1997) ("Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime *of which* he is guilty is the same: whatever is the underlying offense."); *James*, 2006 WL 2536614, at *3 ("Significantly, the aiding and abetting statute, 18 U.S.C. § 2, does not define a separate crime, but rather provides another means of convicting someone of the underlying offense.") (internal quotation marks and footnote omitted).

[4] While the en banc petition in *Vidal* did argue that "the panel's decision conflicted with the Ninth Circuit's decision in *Penuliar*" (Br. in Opp. 14), it did

spondent's contention, the government is not seeking to "have it both ways" in arguing (1) that the decision below conflicts with *Baca-Valenzuela* and (2) that the grant of en banc review in *Vidal* does not render certiorari review in *Duenas-Alvarez* premature. Br. in Opp. 14 n.3. The decision below conflicts with *Baca-Valenzuela* because that case interpreted a prior definition of "aggravated felony" that did not explicitly include aiding and abetting; it does not conflict with *Vidal* because that case interpreted a current definition of "aggravated felony" that *does* explicitly include aiding and abetting.

C. If Left Unreviewed, The Ninth Circuit's Rule Will Have A Substantial Effect On The Administration Of The Immigration Laws

The *Duenas-Alvarez* petition points out (at 15-16) that there are approximately 8000 cases that could be affected by the Ninth Circuit's rule. Respondent contends that "[t]his overstates the impact of the court of appeals' decision," because the decision "does not prevent [the government] from showing * * * that an individual's violation of [Section 10851(a)] constitutes a theft offense under the modified categorical approach." Br. in Opp. 16. In fact, the decision does

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not argue that the decision conflicted with *Penuliar* on the question presented here. Instead, in the portion of the en banc petition cited by respondent, Vidal argued that the documents in the record were insufficient to show that he had been convicted of a "theft offense" under the "modified categorical" approach, because the charging instrument merely tracked the language of California Vehicle Code § 10851(a). See 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 4-5, 16-17. There is in fact no conflict between *Vidal* and *Penuliar* on that point. The Ninth Circuit did not hold in *Penuliar* that a charging instrument is insufficient if it tracks the statutory language; it held that it is insufficient if the generic definition of an offense excludes aiding and abetting (because a defendant charged as a principal can be convicted as an aider and abettor). See Pet. App. 15a-17a. The generic definition at issue in *Vidal* explicitly includes aiding and abetting.

precisely that as a practical matter in a great number of cases. As explained in the *Duenas-Alvarez* petition (at 17-18), under the Ninth Circuit's "modified categorical" holding (see Pet. App. 15a-17a), even an alien explicitly charged as a principal will not be deemed to have been convicted of a "theft offense" on the basis of the charging instrument and corresponding judgment (because a defendant charged as a principal can be convicted as an aider and abettor), and other documents from the criminal case often will be unavailable or difficult to obtain, or will shed no light on whether the alien was convicted as what the Ninth Circuit regards as a "true principal."

The *Duenas-Alvarez* petition also explains (at 20-21) that the Ninth Circuit's rule has few obvious limits and may well be extended to other crimes that are a basis for removal under the INA. Respondent disagrees. According to him, the holding of the Ninth Circuit is merely that "a violation of Section 10851(a) of the California Vehicle Code does not * * * constitute a 'theft offense' for purposes of the INA"; the Ninth Circuit "has not extended that holding to other contexts"; and "there are logical reasons why [it] might choose not to do so." Br. in Opp. 17. In fact, the Ninth Circuit's holding that the generic definition of "theft offense" excludes aiding and abetting has already been applied to other theft crimes, see *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1207-1208 (9th Cir. 2002) (en banc) (general theft under California Penal Code § 484(a) (West 1999)); *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022, 1027-1028 (9th Cir. 2005) (grand theft under California Penal Code § 487(c) (West 1999)), and the brief in opposition does not identify any "logical reasons" for not extending it to crimes such as murder, rape, and bur-

glary, see 8 U.S.C. 1101(a)(43)(A) and (G); *Duenas-Alvarez* Pet. 20-21.[5]

D. *Duenas-Alvarez* Is A Suitable Vehicle For Deciding Whether The Ninth Circuit's Rule Is Incorrect

1. Respondent contends (Br. in Opp. 17-18) that *Duenas-Alvarez* is an unsuitable vehicle for deciding the question presented, because, unlike most California theft statutes, California Vehicle Code § 10851(a) includes the term "accessory," and thus is broader than the generic definition of "theft offense" without regard to whether that generic definition includes aiding and abetting. Even if the statute's inclusion of "accessory" means that Section 10851(a) is not categorically a "theft offense," *Duenas-Alvarez* is still a suitable vehicle for deciding whether the generic definition includes aiding and abetting. As explained in the *Duenas-Alvarez* reply brief (at 5-8), whatever the significance of the term "accessory" in the statute, an alien charged with violating Section 10851(a) as a principal has been convicted of a "theft offense" under the "modified categorical" approach if "theft offense" includes aiding and abetting—and, in any event, the Ninth Circuit has already applied the rule challenged here to statutes that do not include the term "accessory."

2. Respondent contends (Br. in Opp. 19-20) that *Duenas-Alvarez* is an unsuitable vehicle for the additional reason that the Ninth Circuit remanded the case to the Board of Immigration Appeals, and thus, according to respondent, the case

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[5] Respondent also contends that "[t]here is no pressing need to resolve the issue presented" because "both houses of Congress have addressed [it] through pending legislation." Br. in Opp. 14-15. As of the date of the filing of this reply brief, however, a conference committee has not even been appointed to reconcile the two major immigration-reform bills, which differ in significant respects. As respondent acknowledges, therefore, "it is still unclear when and if these bills will become law." *Id.* at 15 n.4. For that reason, the pendency of the bills provides no basis for denying certiorari.

is in an interlocutory posture. That contention fails for a number of reasons.

In the first place, this case is not in an interlocutory posture in the sense in which that term is ordinarily understood when the decision is by a federal court of appeals, because the case has not been remanded to a federal district court, such that it remains within the Judicial Branch. A decision of a federal court that reverses an agency decision and remands the matter to the agency is *final* for purposes of further judicial review. Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990) (order of district court effectively declaring regulations invalid and remanding case to agency is "final decision" under 28 U.S.C. 1291).

Moreover, assuming that the case was remanded "to conduct [a] modified categorical review" (Br. in Opp. 20)—the court of appeals' brief memorandum opinion does not say what the purpose of the remand is—that would not be a basis for denying review on "interlocutory" grounds in *Duenas-Alvarez* even if there could be a case in which a court's remand to an agency renders the case nonfinal. Respondent was charged as a principal, see Pet. App. 16a n.8; the Ninth Circuit held that that is not a sufficient basis for a finding that he was *convicted* as a principal (because a defendant charged as a principal can be convicted as an aider and abettor), *id.* at 15a-17a; and Duenas-Alvarez was likewise charged as a principal, in language essentially identical to that in the charging instruments in this case, see *Duenas-Alvarez* Pet. App. 13a (No. 05-1629). The Ninth Circuit's "modified categorical" holding in this case and the administrative record in *Duenas-Alvarez* thus combine to make it virtually inevitable that the agency would find that Duenas-Alvarez was not convicted of a "theft offense," and the government would not be able to seek judicial review of that decision. Under these circumstances, the court of appeals' decision in *Duenas-Alvarez* is

final (rather than interlocutory) both because the "outcome of [the] further proceedings [is] preordained" and because "the governing * * * law would not permit [the government] again to present [its] * * * claim[] for review" if the agency ruled in favor of Duenas-Alvarez. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 479, 481 (1975).

Even if the decision could be viewed as interlocutory, however, "there is no absolute bar to review of nonfinal judgments of the lower federal courts," *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam), and the considerations identified above would justify the exercise of this Court's certiorari jurisdiction. The exercise of that jurisdiction in *Duenas-Alvarez* is particularly warranted inasmuch as the Ninth Circuit's rule that "theft offense" excludes aiding and abetting is "clearly erroneous," *ibid.*; the rule conflicts with the rule applied in other circuits; a large number of immigration cases are affected by the rule, see *Duenas-Alvarez* Pet. 15-21; there is a substantial threshold jurisdictional question in this case and most of the other cases in which the Ninth Circuit has applied the rule, see *id.* at 23-24; and there is likely to come a point in the near future at which the question presented no longer reaches that court, inasmuch as the Board of Immigration Appeals is bound by the Ninth Circuit's decisions in cases arising there, see, *e.g.*, *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be held pending this Court's disposition of *Gonzales* v. *Duenas-Alvarez*, No. 05-1629, and then disposed of accordingly.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SEPTEMBER 2006